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REPORTS
OF
CASES IN LAW AND EQUITY



ARGUED AND DETERMINED IN THE

SUPREME COURT OF THE STATE OF GEORGIA,
=

CONTAINING THE DECISIONS AT

MACON, JANUARY TERM, 1859; AND PART OF THE
DECISIONS AT ATLANTA, MARCH TERM, 1859.

VOLUME XXVII.

B. Y. MARTIN, REPORTER

COLUMBUS TIMES STEAM POWER PRESS,
COLUMBUS, GEORGIA, 1860.

Entered according to the Act of Congress, in the year 1860, by

B. Y. MARTIN,

In the Clerk's Office of the District Court of the Northern District of Georgia.

Rec Nov 19, 1860

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF THE STATE OF GEORGIA,
AT MACON,
JANUARY TERM, 1859.

Present—JOSEPH H. LUMPKIN,
CHARLES J. McDONALD, }
HENRY L. BENNING, } Judges.

WILLIAM SLADE and **JEREMIAH SLADE**, plaintiffs in error,
vs. **JOHN J. STREET**, administrator of **ANN STREET**, defendant
in error.

If a Court of Equity has jurisdiction of any case of will probate, the case can be only one in which, the probate is, for some reason, not attainable in the Court of Ordinary.

In Equity, from Dooly Superior Court. Decision by Judge Lamar, at October Term, 1858.

John J. Street, as administrator of Ann Street, filed this bill in the Superior Court of Dooly county, to October Term, 1853, against William Slade and Jeremiah Slade, alleging, that William Slade, in the year 1846, died in said county, leaving a last will and testament, that at the — Term 18 — of the Inferior Court of said county, sitting for Ordinary purposes, said will was propounded for probate by Jeremiah Slade, one of the executors; a *caveat* was filed to the probate on the ground, among others, that the will attempted to manumit slaves. The said Court of Ordinary sustained the *caveat* up-

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on that ground alone, and granted letters of administration to William Slade, son of testator. The executor appealed to the Superior Court; that pending said appeal, the court-house of said county, together with all the papers in said cause, except perhaps the will, were burned up. That afterwards it was corruptly and fraudulently agreed by, and between the said William Slade, for himself and the other heirs and distributees of his father, and the said Jeremiah Slade, executor of said will, for a certain consideration, paid to said Jeremiah, that the judgment of the Court of Ordinary, should stand, and that said Jeremiah would desist from prosecuting his appeal; that no attempt was afterwards made to prove said will—that at that time, the said Ann Street was an infant *feme sole*, without a lawful guardian resident in the State of N. C., and had no knowledge that she was a devisee under said will, until a short time previous to her death, in 1852. That the facts were studiously concealed from plaintiff and his intestate; that neither of them ever received anything under said will, or any compensation, or consideration for her interest therein. That Ross and Hodges, two of the witnesses to said will, were not permitted to testify to its execution, but were informed that they would subject themselves to pains and penalties for attempting to aid in the emancipation of slaves, by proving said will; that testator gave to plaintiff's intestate, by said will, two lots of land, No. 25 and No. 40, in the 10th district of Dooly county. That defendants have, under color of the administration granted to William Slade, sold said lots at a greatly inadequate price, and converted the proceeds to their own use. That complainant has been informed and believes that defendants, or one of them, have in possession the original will, or a substantial or true copy thereof.

That complainant and his intestate have repeatedly demanded of the said Jeremiah, executor as aforesaid, if said papers were destroyed to establish the same, and prosecute said cause to final judgment, and also to produce said original will, or to furnish a copy thereof, and to yield up to him the

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land aforesaid, or to pay over to him the full value thereof, but that defendants refuse so to do. The bill prays, that the defendants may be compelled to set forth a true copy of said will, and the proceedings touching the probate thereof; that the contract between said William and Jeremiah, should be set aside for fraud; that said copy should be established, and said cause proceed in said appeal, and said will be fully established; that the administration granted to William Slade be revoked, and that complainant should recover the devise to his intestate under said will, or in the event said land has passed into the hands of innocent purchasers, then, that defendants be compelled to account for the present value thereof, with rents, issues, and profits.

To this bill defendants demurred, on the ground, that a Court of Equity had no jurisdiction in and over the matters set up and alleged therein, but, that the same were alone cognizable in and by the Court of Ordinary.

After argument, the Court overruled the demurrer, and counsel for defendants excepted.

DAWSON, represented by **STUBBS & HILL**; **S. T. BAILEY**, for plaintiffs in error.

HALL; and **SCARBOROUGH**, *contra*.

By the Court.—**BENNING J.** delivering the opinion.

Did a Court of Equity have jurisdiction of this suit?

The bill prayed, that a judgment of a Court of Ordinary, rejecting a paper propounded as a will, should be set aside; that this paper should be established, as a will, and the administration of it, as a will, superintended; and, that the letters of administration, in the way, should be revoked.

Certainly, the Court which has jurisdiction over common

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cases of this sort, is a Court of Ordinary, and is not, a Court of Equity.

Perhaps it is true, (and I myself incline to think that it is true,) that the only Court which has jurisdiction over cases of this sort, whether they be common or uncommon cases, is the Court of Ordinary. The Act of 1810, says, that the Court of Ordinary "shall have the original jurisdiction of all testate and intestates estates, appointing administrators and guardians, to qualify executors, administrators and guardians, and to bind out orphans, and all such other matters and things, as appertain, or relate, to estates of deceased persons, testate or intestate." *Pr. Dig.,* 239.

Another Act gives the Superior Courts an appellate jurisdiction, in all cases over which, the Courts of Ordinary have original jurisdiction. *Id. 237.*

These Acts are but to carry out the words of the Constitution itself. "The powers of a Court of Ordinary or Register of Probates, shall be vested in the Inferior Courts of each county, from whose decision, there may be an appeal to the Superior Court." *Id. 910.*

Is it not the conclusion to be drawn from this part of the Constitution, and from these Acts to carry out the part, that the Courts of Ordinary have *exclusive original* jurisdiction of all cases concerning probates and administrations—all, without a single exception—and that the only jurisdiction of such cases which, any other Court has, is an *appellate* jurisdiction. I strongly incline to think so. Perhaps, a Court of Equity may have the power to aid this jurisdiction of the Courts of Ordinary, by compelling discovery. That is a question on which, I express no opinion. See *21 Ga.,* 14.

But, at least, this may be assumed as true; that to put a case like the present, within the jurisdiction of a Court of Equity, the case must be one entitled to a relief which, a Court of Ordinary cannot give, and which a Court of Equity can give. This, the counsel for the defendant in error, admit.

The question then becomes this, is the present case enti-

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tled to a relief which, a Court of Ordinary cannot give, and which a Court of Equity can give?

What is the relief to which, the case is entitled? The establishment of the paper as a will. That will comprehend all the relief prayed for. Is this a relief attainable, better in a Court of Equity, than in a Court of Ordinary? We do not see, that it is.

Grant that the paper to be propounded as a will has been burnt up, yet a Court of Ordinary can as well establish a lost or destroyed will, as can, a Court of Equity. Whatever evidence, in such a case, a Court of Equity can command a Court of Ordinary can equally command. Cases in plenty, of the establishment of lost wills by the Ecclesiastical Courts, are to be found.

Grant, also, that this paper was once presented to the Court of Ordinary, for probate, and was then adjudged to be not a will; and grant, that the reasons stated in the bill why that judgment should not bind Street, the defendant, are sufficient, yet those reasons will be as available in the Court of Ordinary, as they could be, in a Court of Equity. What are those reasons? They are; first, that the judgment was procured by a fraudulent agreement between the person named as executor in the paper, and the heirs of the author of the paper. Secondly, that one of the beneficiaries under the paper, at the time of the judgment, was a minor, was a resident of North Carolina, and was without notice of the suit. These reasons would be as available in the Court of Ordinary, as they could be in a Court of Equity. A Court of Ordinary can set aside any of its judgments procured by fraud; a Court of Equity could do no more. A Court of Ordinary would no more hold one of its judgments, to be binding on a person not of age, or not within the State, or not having notice of the suit in which, the judgment was rendered, than would a Court of Equity.

For aught that we can see, then, the relief to which, the complainant Street is entitled, is quite as attainable in a

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Court of Ordinary, as it could be, in a Court of Equity. Consequently, we think, that a Court of Equity has no jurisdiction of this case. Therefore, we must hold, that the demurrer ought to have been sustained.

Judgment reversed.

JOB TURNER, plaintiff in error, vs. HENRY B. JONES, and others, defendants in error.

- [1.] If the bill states a title in the plaintiff, and alleges that a discovery is necessary to establish that title, a demurrer on the ground that there is an adequate remedy at law is not sustainable.
- [2.] Turner filed his bill against Joiner and Spicer, and against Hodges and others, in which, he alleged, that a lot of land, drawn by Jones, was sold under a *f. fa.* against Jones, and bought by Hodges,—that the Sheriff made a deed to Hodges, but that this deed had been burned with the Court-House; that Hodges sold the land to Turner, and that afterwards Jones, thinking to take advantage of the destruction of the deed, also bought the land, and put Spicer in possession of it, as his tenant. The bill also alleged, that a discovery was necessary, to enable the plaintiff to prove these allegations. It prayed, that the deed might be established, and that the land be delivered to Turner, and the rents accounted for to him.

Held, That Joiner and Spicer were proper parties to the bill.

In Equity, from Schley county. Decision on demurrer, by Judge WORRILL, at August Term, 1858.

This was a bill by Job Turner, against Henry B. Jones, John Joiner, Cullen R. Lockett, John Hodges, and Winstead Spicer, to establish a lost deed, and for an account and relief.

The bill states that Henry B. Jones was the drawer of lot of land No. 132, in the third district of originally Muscogee, now

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Marion county, to whom a grant from the State issued: That afterwards, in 1838, a *fi. fa.* issued against Jones, from a Justices Court in Meriwether county, and transferred to Marion county, and levied upon said lot of land as the property of Jones. Levy dated 22d March, 1842, and said lot of land sold on the first Tuesday in May, 1842, by said Cullen R. Lockett, Sheriff of said county, to said John Hodges, for the sum of fourteen dollars, who executed to him a deed for the same.

The bill further states, that at the time of the execution of said deed by the Sheriff to Hodges, the said deed and execution were handed to the Clerk of the Superior Court of Marion county, who duly recorded the same; but that said originals and record were afterwards destroyed by the burning of the Court House of said county, in 1845.

The bill further states, that Hodges sold said lot of land to plaintiff on the 15th day of December, 1851, and executed and delivered his warrantee deed for the same. That John Joiner pretends to have title to said lot of land, and claims the same, and has placed Winstead Spicer in possession thereof, as his tenant. That at the time Joiner purchased said lot, he knew that plaintiff had a good title to the same, and was in possession thereof; but knowing that said execution and deed had been destroyed by fire, as before stated, he purchased with the intention to defraud plaintiff.

The bill states, that plaintiff has no means of establishing the foregoing facts but by a discovery from said parties—defendants.

The prayer of the bill is, that copies of said destroyed *fi. fa.* and deed be set up and established by a decree of this Court, in lieu of the originals so destroyed; that said Joiner, his assigns and tenants, be compelled and decreed to deliver to plaintiff, the possession of said lot of land, and account for the rents and profits of the same.

Defendants demurred to this bill, on the grounds:

- 1st. Because plaintiff had full and adequate remedy at law
- 2d. Because of a misjoinder of parties.

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After argument, the Court sustained the demurrer and dismissed the bill, and plaintiff excepted.

BLANDFORD & CRAWFORD, for plaintiff in error.

W. D. ELAM, contra.

By the Court.—BENNING J. delivering the opinion.

Was the Court right in sustaining the demurrer?

The grounds of the demurrer were two. 1st. That there was an adequate remedy at law. 2d. That Joiner and Spicer were improperly joined with the other defendants.

[1.] The bill states facts which make out a right in the plaintiff, to the relief he asks for; and it says, that he has no means of establishing these facts, except a discovery from the defendants. If this allegation be true, there is no adequate remedy at law—the discovery-act left out of the question, as by its own terms, it has to be. And the bill being demurred to, we have to take the allegation as true.

The first ground of the demurrer, then, was not good.

[2.] Was the second, good? That was, a misjoinder of parties; that Joiner and Spicer were improper parties defendants.

First, as to Joiner.

The bill alleges, that the land was sold under a *fi. fa.* against the drawer, Jones, and bought by Hodges; and, that the deed made by the Sheriff, to Hodges, was burned. That Hodges sold the land to Turner, the plaintiff,—that afterwards, Joiner, thinking to take advantage of the destruction of the Sheriff's deed, also bought the land, and put Spicer in possession of it as his tenant.

If these allegations are true, Turner is entitled to have the destroyed deed established, and also, to recover possession of the land with the rents. And these things are what the bil

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prays for. It is, therefore, highly to the interest of Joiner, to show, that they are not true. But this he cannot do, without being a party to the bill. He, therefore, ought to be a party to the bill. *2 Dant. Ch. Pr.* 373.

Again, Hodges having had his deed burnt, and not being able to prove the deed, and the other facts of his case, without a discovery, has the right to go into equity against *Joiner to get possession of the land and the rents.* Now, suppose we admit it to be true, that Joiner and Spicer ought not to be joined with Hodges, and the other defendants, yet it would be for the *plaintiff,* to say which of these two sets of defendants, he would strike from his bill, and will Joiner think it to his interest, that himself and Spicer should be retained, and Hodges and the other defendants rejected? We hardly suppose that he will; what he wants is, that he and Spicer shall be dismissed from the bill, but whether he will get that or not, even if he is right in his view of the law, will depend on the plaintiff.

For aught that we can see, Joiner was a proper party to the bill.

And if it be true, that Joiner was a proper party to the bill, it must be true that Spicer was, for Spicer was but the tenant of Joiner.

We think, then, that the second ground of the demurrer, was like the first, invalid. Consequently, we think the Court below erred in sustaining the demurrer.

Judgment reversed.

McCrary vs. King and Dimond.

BARTLY McCRARY, plaintiff in error, vs. **Tomlin King and
Luke Dimond**, defendants in error.

Where a promissory note to which there is a surety, is held by a creditor of the owner, as a collateral security—such creditor is the proper person, to be notified by the surety, to sue the maker, under the statute of 1831.

Certiorari, from Muscogee county. Decision by Judge WORRILL, at November Term, 1858.

Bartly McCrary brought suit in a Justice Court against Tomlin King and Luke Dimond, on a promissory note, of which the following is a copy:

\$50. By the first day of November, we or either of us promise to pay Bartly McCrary, or bearer, the sum of fifty dollars, for value received, this February 18, 1857.

(Signed,) _____

**TOMLIN KING,
LUKE DIMOND.**

Dimond filed the following pleas in the Justices Court:
1st. The general issue.

2d. That he was security only for King, and prayed that if judgment be rendered against him, it should be against him as *security*.

3d. That being only security on said note, and which was known to plaintiff, after said note became due, he had given notice to the holder, John J. McKendree, to sue on said note and collect the same out of the principal, which said holder had failed to do, within three months thereafter, whereby defendant was discharged as provided by statute.

The plaintiff offered and read in evidence the note and closed.

It was admitted that Dimond was only security on the note, and known so to be by plaintiff, at the time said notice was given.

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J. J. McKendree testified: That plaintiff placed the note in his hands for the convenience of King and Dimond, to pay the same when due, and instructed witness to apply the proceeds when collected, to the payment of demands held by him, witness, against plaintiff. That said note was not paid at maturity; that sometime in December or January, last, after the note fell due, Dimond called on witness and told him that he wanted him to proceed and make the money out of King, and that there was cotton belonging to King in Columbus, more than sufficient to pay the debt. The note was then in possession of witness, and more than three months elapsed before said note was put in suit. That witness told Dimond that he had no authority or right to institute suit upon said note; for plaintiff told him not to sue on said note when he deposited it with witness, and told Dimond where plaintiff lived, and advised him to notify plaintiff, that he, witness, was not the agent of plaintiff, and had no interest in the note. That if said note had been paid to witness, he would have delivered up the note; that he had the right to receive the amount due on said note, and it was placed in his hands for that purpose; that witness never notified plaintiff of what Dimond had required in relation to suing and collecting said note, until sometime in June or July last, nearly six months after the notice was given.

Upon this testimony, the Justices gave judgment against both defendants, King as principal, and Dimond as security; to which judgment, Dimond excepted, and sued out a certiorari, to have said judgment corrected and reversed.

Upon the hearing before Judge WORRILL, he reversed the decision and judgment of the Justice's Court, and ordered a new trial.

To which decision counsel for McCrary excepted.

CORBET; and DENTON, for plaintiff in error.

ALEX. COOPER, *contra.* •

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By the Court.—BENNING J. delivering the opinion.

The judgment sustaining the certiorari, was clearly right, if McKendree, the person, to whom the notice to sue, was given, was the person to whom that notice ought to have been given.

McKendree held the note, as a collateral security. He was instructed by the owner of the note, to apply the proceeds of it, when collected, to the payment of a demand held by himself, against the owner. This gave him the right to hold on to the note, as a security for this demand.

This being so, he was the legal as well as the "actual holder" of the note; he and he only, was the person who had the right to bring suit upon it. He therefore was the person proper to be notified by a surety to the note, to sue the maker of it, under the Act of 1831, (*Pr. Dig.* 471,) for that Act says, that "where the security" to a note shall "require the holder thereof, to proceed to collect the same," and the holder does not proceed to do so, within three months, the "security shall be no longer liable."

In *Curhart, Bro. & Co. vs. Wynn*, (22 Ga. 24,) the holder had no legal title to the note, as a collateral security; a thing which distinguishes that case from this.

Judgment affirmed.

Judge McDONALD, on account of illness, did not preside in this case.

Compton vs. Williams.

P. M. COMPTON, plaintiff in error, vs. MATHEW WILLIAMS, defendant in error.

[1.] When one of the sureties on a *ca. sa.* bond, surrenders the principal, the act is a discharge of all the sureties.

[2.] Lassiter and Cross were sureties for Williams, on a *ca. sa.* bond. Lassiter surrendered Williams, and, thereupon, Brown wrote on the back of the bond, "I hereby agree to be bound on said bond in his," Lassiter's "stead."

Held. That this writing meant that he, Brown, was to be liable only along with Cross as Lassiter had been; not, that he was to be liable, whether Cross was or not.

[3.] The principal in a *ca. sa.* bond, is not discharged from it, by the discharge of the sureties, nor, by the act of the Sheriff, in letting him go at large. Therefore, if he appears according to the condition of the bond, he is to be dealt with, as though nothing unusual had happened.

Motion to enter up judgment on *ca. sa.* bond. Made before Judge Kindoo, in Terrell Superior Court, at September adjourned Term, 1858.

A writ of *capias ad satisfaciendum* issued from the Superior Court of Terrell county, at the instance of the plaintiff in error, against the defendant in error, returnable to the September Term, 1858, of said Court. The defendant, Williams, having been arrested by the Sheriff of said county, gave bond, with S. F. Lassiter and Wm. G. Cross as his securities, for his appearance at the Superior Court of the county of Terrell, on the third Monday in September, 1858, then and there to stand to and abide such proceedings as might be had by the Court, in relation to the taking of the benefit of the Act for the relief of insolvent debtors, by the defendant, Williams, and to personally answer and perform such further order of said Court, as might be made in the premises.

During the September Term of said Court, the security, Lassiter, delivered up, in open Court, the body of the defendant, Williams, and the following agreement was endorsed on the bond:

"S. F. Lassiter having come into Court and delivered up the defendant, M. Williams, I hereby agree to be bound on

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said bond in his stead, for the purposes therein mentioned. Witness my hand and seal this 25th day of September, 1858.

ABSALOM BROWN, [L. s.]

Tested by W. C. THORNTON, *Sheriff.*"

An *exonoretur* as to Lassiter, from liability on said bond, was entered on the minutes of the Court, at the regular September Term aforesaid. At the adjourned Term of said Court, in the month of November, 1858, and on the last day of said Term, the case was called. The defendant, Williams, was in Court, but was not offering to take the insolvent oath, and had failed to give notice, or to comply with the requirements of the statute for the relief of honest debtors. Plaintiff here proposed to enter up judgment on the bond, against the securities, William G. Cross and Absalom Brown, which motion the Court refused to allow, on the ground that the *exonoreter*, as to Lassiter, operated as a discharge from liability on said bond, as to his co-security, Cross, also. To this decision plaintiff excepted.

Plaintiff then moved to enter up judgment on the bond, as to the new security, Brown. The Court refused the motion, and plaintiff excepted.

Plaintiff then moved the Court to order the defendant, Williams, into the custody of the Sheriff, and to jail, in discharge or satisfaction of said *ca. sa.* Which motion the Court refused, and plaintiff excepted.

LYON & IRVIN; DOUGLASS & DOUGLASS, for plaintiff in error

MCCAY & HAWKINS; HOOD & ROBINSON, *contra.*

By the Court.—BENNING J. delivering the opinion.

[1.] If Cross was discharged, the Court was clearly right, in refusing the first motion. He was discharged. The surrender of Williams, the principal, by Lassiter, Cross's co-surety, took Williams out of the custody of Cross. That was suf-

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ficient to discharge Cross from the bond. The case was the same in principle, as if Williams had been arrested for a crime, which would have discharged the bail, and, for the reason, that such arrest would take their principal out of their custody.

[2.] If Brown was not bound, the Court was also clearly right, in refusing the second motion. And Brown was not bound. By the terms of his contract, he was merely to be bound, in Lassiter's stead; that is, was to be bound, in the same manner as that in which Lassiter had been bound. And Lassiter had been bound, only along with Cross. Then, Brown, by the terms of his contract, could only be bound along with Cross. But Cross not being bound, he, Brown, could not be bound.

On these two motions, then, we think that the Court was right.

If Williams, the principal, was still liable on the bond, the Court was wrong in overruling the third motion; for he was in Court, and that was a compliance with the condition of the bond, and the motion was the one called for by the state of the case—called for by the absence of preparation, on the part of Williams, to entitle himself to take the oath. The condition of a *ca. sa.* bond, is, not, that the defendant shall appear and *take the oath*; but, that he shall appear and “abide by such proceedings as may be had by the Court, in relation to his, her or their taking the benefit” of the Act. Consequently, if he appears, and abides by the proceeding that may be had in his case, whatever that may be, whether an order of discharge, or an order of imprisonment, he has complied with the condition of his bond. Williams, then, being in Court, he had performed the condition of his bond, and the motion being the regular one, the state of the case considered, it should have been granted, unless something had happened by which, Williams had been discharged from the bond. This seems manifest.

Now had any thing happened to discharge Williams from

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the bond, or to render it null, as to him? Nothing, as far as we can see. Things had happened by which, his sureties were discharged; but these things did not extend to him, and his liability. The discharge of the principal, is the discharge of the surety; but the discharge of the surety, is not the discharge of the principal. Suppose Williams had given the notices, &c., to his creditors—had done all that the law required him to do, would he not have been entitled to the benefit of the Act, notwithstanding the fact, that his sureties were discharged? Can there be a doubt of it?

True, the Sheriff discharged him out of his *custody*, when Brown stipulated to take Lassiter's place. But what of that? Could the Sheriff discharge him from his *bond*? The Sheriff had no power to do such a thing. Besides, *that* was not the intention of the Act, but was just the reverse; the intention was, that Williams should comply with the condition of the bond—was, that the bond should still be binding on him. The act may have been one by which, the Sheriff himself became subject to a liability, but we do not see how it could be one, to discharge Williams from his liability.

[3.] We think, then, that, as nothing had happened to discharge Williams from the bond, and as he was in Court, the Court should have granted this third motion—the motion to order Williams into custody.

Judgment reversed.

MCDONALD J. absent.

Jacobs vs. Pou, adm'r.

HENRY JACOBS, plaintiff in error, vs. **JOSEPH POU**, administrator, &c., defendant in error.

A judgment granting a new trial on the ground, that the verdict is contrary to the evidence, will not be disturbed, except in a case of the flagrant abuse of discretion.

In equity, in Talbot Superior Court. Decision by Judge WORRILL, September Term, 1858.

In 1825, Seaborn Jacobs died, owning a small estate, and leaving a widow and two infant children, George M. Gullett became the administrator, and took possession of the estate. In 1831, letters dism issory were granted by the Ordinary of Monroe county, to the administrator. Gullett afterwards, died, and Joseph Pou was appointed administrator of his estate. T. W. Moore was appointed guardian of Henry Jacobs, one of the minors, (the mother and one of the children being dead,) and as such, filed a bill for account against the administrator of Gullett. In 1847, Henry Jacobs arrived at age. The bill of the guardian continued pending until 1851, and was then dismissed. In 1852, (but not within six months after the dismissal of the former bill,) Henry Jacobs in his own right, filed a bill against Pou, as administrator, for an account, and alleged that the judgment granting letters of dismission had been fraudulently obtained by the said Gullett, by false representations made by him to the Ordinary, as to his having settled up and paid out said estate.

In September, 1855, complainant filed an amendment to the bill alleging that for several years before he became of age, and ever since that, that he resided in the State of Alabama, at a great distance from the county of Talbot; that he relied for a successful assertion of his rights in this case upon the fidelity of his guardian, Thomas W. Moore, in prosecuting the suit commenced by him; that he knew nothing of the abandonment of the bill by Moore, until within two

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weeks before the filing of the bill in his own name. The amendment further alleged, that said Gullett obtained his dismissal by the Court of Ordinary of Monroe county, without paying over the distributive share of complainant, by the consent and connivance of complainant's mother; that Gullett represented to her that he wanted to remove to Talbot county, that it would be inconvenient for him to make his returns in Monroe, that he wanted to relieve his securities, and that if complainant's mother would make no objection to his dismissal, he would hold the shares of complainant and his sister until they became of age, or until a guardian should be appointed for them in Stewart county, to which complainant's mother was about to remove and that Gullett did in fact, subsequent to his dismissal, recognize his liability on said agreement with complainant's mother.

On the trial of this bill, it was proven by *Mrs. McKenzie*, "that she was very confident that Mr. Gullett never paid over any portion of the estate or its proceeds to any person, during his life-time, except the pittance of interest which he paid to the widow; and her reasons were, that Henry Jacobs lived with her the most of the time, from his father's death, to the death of Gullett, and if there had been any money paid, she would have known it."

Mrs. McNeil, swore: That in 1827 or 1828, George M. Gullett said he had in his hands \$400 belonging to the heirs of Jacobs, and gave Mrs. Jacobs, a written statement, showing what was due to the heirs; that Mrs. Jacobs had that writing in 1836; that Gullett never paid, so far as she knew, but five dollars of that sum, and that was for the schooling of Henry, about 1833; that witness went with the widow Elizabeth Jacobs, to Forsyth, in Monroe county; that Gullett petitioned for a dismissal; that there was an agreement in writing, given by Gullett to the mother of Henry Jacobs, acknowledging that he had four hundred dollars in his hands, and that he would remove it to Talbot county, and place it on the record there.

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Lemuel T. Downing, swore : That within six months after the dismissal of the former bill, filed by the guardian, he forwarded to the Clerk of Talbot Superior Court, this bill, directing him to file it; that he so sent the bill, supposing that the administrator, still lived in the county of Talbot.

George N. Forbes, Clerk of the Superior Court of Talbot county, swore : That he received this bill within six months after the dismissal of the former bill. Defendant had not resided in the county of Talbot for more than a year; but witness knew that he intended shortly to return to Talbot; witness immediately notified Mr. Downing, complainant's solicitor, of these facts; as soon as defendant returned to Talbot this bill was marked of file.

The jury found a verdict for the complainant. On motion the Court granted a new trial, because the verdict was contrary to law and evidence.

To this decision, the complainant excepted.

L. T. Downing, for plaintiff in error.

B. Hill; Smith & Pou, contra.

By the Court.—BENNING J. delivering the opinion.

In this case, the Court below granted the motion for a new trial, which motion was put on the ground, that the verdict was contrary to law and evidence.

A majority of this Court do not see any sufficient reason to disturb the judgment granting the motion. They would, however, have been as well satisfied had the motion been refused. There was some evidence on both sides.

Further remark, the case does not seem to call for.

Judgment affirmed.

Powell et al. vs. Powell.

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JAMES L. POWELL et al., plaintiff in error, vs. JOSIAH C. POWELL, defendant in error.

A mother, gratuitously, conveyed the half of lot *one hundred and fifty-eight*, to one of her children, she intending to convey the half of lot *one hundred and fifty-seven*. She died intestate, leaving this child and other children, and this child filed a bill against her administrator, to correct the mistake.

Held, That he had no right to have the mistake corrected, the deed being voluntary.

In equity, in Marion Superior Court. Tried before Judge WORRILL, at September Term, 1858.

This was a bill filed by Josiah C. Powell, against James L. Powell and Martin L. Bivins, for the purpose of correcting a mistake in deeds.

The bill states, that at the sale of the estate of William Powell, deceased, made by complainant and Bivins, as executors of said William, the south half of lot of land No. 157, in the 32d district of Marion county, was purchased by Nancy Powell, the widow of testator, and mother of complainant; that by mistake, said land was described in the deed of conveyance made by complainant and Bivins, as executors to said Nancy, as the south half of lot No. 158; that said Nancy subsequently, by deed, made and delivered in her life-time, in consideration of natural love and affection, conveyed said premises to complainant, representing and describing the same as lot No. 158, when it was lot No. 157, and so intended and understood by all the parties in and to both said deeds.

The bill further states, that Nancy Powell, died in 1857, and complainant is in possession of said land, but that James L. Powell, as the administrator of said Nancy, claims the said south half of lot No. 157, as part and parcel of her estate and is threatening to sell a part thereof. The bill prays that said deed be reformed and corrected, and that James L. Powell be enjoined from selling said south half of lot 157, &c.

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Powell and Bivins, demurred to the bill, for want of equity, and at the same time answered, that the deed from Nancy Powell to complainant, was voluntary and not upon valuable consideration, and that complainant was not therefore entitled to the relief sought, as against defendants as heirs at law with him, of said Nancy. It was admitted that James L. Powell and the wife of Bivins, and some three or four others, were the children of the said Nancy, who had departed this life, as stated in the bill, and that nothing had been said about the alleged mistake until since her death, and that complainant from the time said deed was executed, had been in possession of said lands.

The Court charged the jury, that complainant was entitled to have said mistake corrected and the deed reformed, although the consideration was voluntary. To which charge defendants excepted.

The jury found for the complainant, and decreed a reformation of the deeds as prayed for, &c.

Whereupon, defendants tendered their bill of exceptions, assigning as error, the charge of the Court above excepted to.

WELLBORN, JOHNSON & SLOAN, for plaintiffs in error.

BLANDFORD & CRAWFORD, contra.

By the Court.—BENNING J. delivering the opinion.

Was the charge of the Court, right? The charge was as follows: “That complainant was entitled to have said mistake corrected and the deed reformed, although the consideration was voluntary.”

The deed here meant was doubtless, the deed made by Mrs. Powell to Josiah C. Powell the complainant. The real parties to the question, were this Josiah C. Powell, a child of Mrs. Powell, as plaintiff, and the other children of

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Mrs. Powell, as defendants, the latter, represented by her administrator. She died intestate. And it was conceded, that if Josiah recovered the land meant, (as he alleged,) by the deed, he would get more than his share of the mother's estate.

The deed by mistake, conveying the half of No. 158, instead of the half of No. 157; the *legal* title to the half of No. 157, did not by it pass out of Mrs. Powell; and consequently, that title, when she died intestate, was cast by the law, on her heirs.

The question then is, was a Court of Equity authorized to interfere against the legal title thus held by all her heirs, in favor of one of those heirs, claiming by a defective voluntary deed? And the answer, we think, must be, in the negative.

The general principle on this subject, governing Courts of Equity, is, that where the equities are equal, the legal title prevails.

In the present case, if there is any difference in the equities, it is a difference, in favor of the heirs of Mrs. Powell, and against her voluntary donee. It is the dictate of equity and natural justice, that one's property should be bestowed on one's children, rather than on strangers; and, on those children, equally, rather than, unequally. This is certainly so, if our statute of distributions be taken as the exponent of what is equity and natural justice; for that makes estates go to the intestate's children, and puts the children all on an equality. According to this, then, equity would say to Josiah that he ought to be content to stand on the same footing with his brothers and sisters. They in addition, have the legal title. If, then, the general principle is to govern, they must be allowed to prevail over him.

Is there anything to take his case out of the general principle. It is said that there is. It is said in the first place, that the case of a voluntary conveyance in favor of a wife or children, is an exception to that principle. But we are

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not prepared to admit this proposition. The English decisions seem to be against it. See 1 *Stor. Eq.* Sec. 176, and cases cited; Adams' *Equity* 78. And if we were, this is not a deed in favor of children; it is a deed in favor of a child, at the expense of the children.

In the second place, it is said, that this case is like that of *Wyche and Wife vs. Greene*, (16 Ga. R.) and, in that case, this Court ordered the mistake in the deed to be corrected. But this case is not like that. In that case, taken as presented to this Court, the contest was between parties, all of whom, claimed under the very deed sought to be corrected.

According to the bill filed by some of the children, against Mr. Greene, the father, he held under the deed, under which they claimed. That deed, they insisted, was intended to be a deed giving a life estate to Mrs. Greene, and, by consequence, to him, Mr. Greene, and the remainder to her children; an intention, which they alleged was, by mistake, defeated, so far as the children were concerned, the deed being, by mistake, so expressed as to give the whole interest to Mrs. Greene. Mr. Greene, they insisted, was holding under this very deed. If he was, then, he was bound to let the deed have full effect, whether it was a deed with, or without, a valuable consideration, for it is a principle of law, that he who elects to claim under an instrument, must let the instrument have its full operation. The law will not suffer him, to set up so much of it, as makes in his favor, and reject the rest. By his election to claim under the instrument, he himself gives it validity in all its parts. If Mr. Greene had been claiming by *inheritance*, through his wife, the case would have been more like the present. The defendants to the present bill, claim as *heirs* of Mrs. Powell. They do not claim under the deed made by her, to Josiah C. Powell, their brother.

We see nothing, then, to take the present case out of the general rule, that when the equities are equal, the legal title

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prevails. Consequently, we think, that the Court below, erred in its charge to the jury.

New trial granted.

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ROBERT C. BLACK, plaintiff in error, vs. **WILLIAM A. BLACK**, and **JIMPSEY B. HUNTER**, defendants in error.

A bill had two objects, one, to compel the defendant, to convey to the complainant, an interest in the unsold lots of a town; the other, to compel him, to pay over to the complainant, a share of the profits made by him, from the sales of the sold lots of the town. The lots lay in one county, and the defendant resided in another. The bill was brought in the latter county.

Held, That the latter county, was a proper one in which to bring the bill.

As to when a second bill is the same as the first, so that, the judgment or decree in the first, is a bar to the second.

In Equity, in Schley Superior Court. Decision by Judge **WORRILL**, at August Term, 1858.

Robert C. Black, filed a bill in equity against defendants in error, alleging that in the year 1849, William A. Black, Elbridge G. Cabiness, Virgil A. Powers, Holcomb and Chapman, were associated together as partners, in trade, for the purpose of buying the lands on which the town of Oglethorpe is now situated, and speculating upon them; that said parties had contracted for the Maddox land, the Ichaconner land, the Banon land, and the Suber land; all forming a part of the site of the present town of Oglethorpe; that they paid about four thousand dollars for said lands, one installment of which was due the first day of August, 1849; that the partnership was formed and said lands purchased purely for speculation in selling lots in the town, which it was

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expected would spring up at that place. That the purchase of said lands was not made in the name of the copartnership; but in the name of the individual members of the firm, and that the lands were held in good faith by the individual members for the copartnership; that the partners aforesaid were equally interested in the copartnership.

The bill further alleged, that a short time after the formation of the aforesaid copartnership, and before any sales of lots were made, on the first day of July, 1849, it was agreed between plaintiff and defendants, that they three should form a sub-copartnership in reference to the speculation in said lands, that the interest of the said William A. Black, in the said lands, should be equally shared between the said William A. the said Jimpsey B. Hunter and plaintiff; that plaintiff and said Hunter were to join equally in the advancements and expenses incurred by the said William A., in carrying out the original copartnership, and to share equally with him in the profits of one-sixth part of the speculation. That in pursuance of said contract of partnership, plaintiff paid the said William A. on or about the 19th day of July, 1849, seventy dollars and twenty cents, to be used by him in the payment of the one-sixth part of the first payment for all of said lands.

Plaintiff further set forth, that in pursuance of said contract of sub-copartnership, he moved to the city of Oglethorpe and gave his services to a great extent to said copartnership; that for the purpose of encouraging the improvement of lots and enhancing the value of them, and at the special instance of the said William A. he expended the sum of eight thousand dollars, or other large sum in building upon and improving one of the lots of said copartnership; and that said building was a part of the enterprize, the profits and loss of which were to be equally shared by said sub-copartners; that plaintiff paid to said William A. eight hundred dollars, plaintiff's full share of the burdens of said sub-copartnership, and all that was or ought to have been re-

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quired of him; that said sub-copartnership went on smoothly until about the first of January 1855, when it became evident that the profits would not be so large as it was at first supposed they would be; that said William A. then became at first reserved with plaintiff, and afterwards refused to give him any insight whatever into the affairs of the company; that said sub-copartnership was carried on in the name of said William A. Black, that plaintiff believes it was profitable, and that it realized the sum of ten thousand dollars, but that plaintiff has no means of finding out the truth of the matter, but by searching the conscience of said William A., that five hundred dollars is all that was ever paid over by said William A. to plaintiff, and is all that was paid by said William A. of the profits of said sub-copartnership except what he may have paid said Hunter; that said William A. admits that he has moneys in his hands which in good faith ought to be paid over to plaintiff, but insists that he is protected from the payment of them by certain rules of law, which require such agreements to be reduced to writing, and signed by the parties to the same; plaintiff appended to his said bill a copy of a statement signed by said William A. referring as he alleged to said copartnership, and acknowledging the payment by plaintiff of the one-third of the one-sixth part of the first payment for the lands by the original copartnership; the bill further prayed a full account by the said William A. of and concerning the said sub-copartnership, that he be compelled to pay to plaintiff the amount found due to him, and that such further relief be granted as to the Court might seem meet.

Appended to the bill was the following memorandum:

6)900

3)150

50

1st payment on Maddox land.

R. C. Black's part paid by him.

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6) 330

3) 55

Full payment for the Ichaconner land.
18 R. C. Black's part, paid by him.

6) 120

3) 20

1st. payment on Banon land.
6.66 R. C. Black's part paid by him.

6) 100

3) 16.66

1st. payment on Suber land.
5.55 R. C. Black's part paid by him.

19th July, 1849.

WM. A. BLACK.

To this bill, defendant William A. Black filed his plea in bar, denying that defendant had a right to any further discovery or relief, touching the matters and things, contained in his said bill; because all and singular the matters and things in said complainant's bill, charged and set forth had been theretofore adjudicated between complainant and said William A. by a Court having jurisdiction of the case and the parties, and by a decree still of force, and unreversed; that complainant filed his bill in equity against this defendant in the Superior Court of Marion county, (then the residence of defendant Wm. A. Black,) returnable to the August Term, 1853, of said Court, and by said bill, complainant charged and set forth the identical matters in substance against said defendant Black as are contained in this bill; and that a demurrer to said bill in Marion, was sustained by the Superior Court of Marion county at the September Term, 1857, and by a decree of the Court, said bill was dismissed for want of equity.

The bill to which defendant's plea referred, was filed by the complainant in this bill, and the allegations were substantially as follows: That in the year 1849, Elbridge G.

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Cabiness, William A. Black and Virgil Powers, purchased various parcels of land, (which are set out by numbers and localities) in said bill; that they purchased a tract near the Ichaconee Creek in Houston county, and afterwards sold a portion of it to the South-Western Railroad for a water station and depot site; that they bought a tract from a man named Mattox; and that the lands west of Flint river in Macon county, were laid off into town lots, and are the site of the city of Oglethorpe; that said land was purchased with a view to speculate on said town lots; that a ferry across Flint river, immediately below the town of Oglethorpe, was also purchased by said Cabiness, Powers and William A. Black.

Plaintiff further alleged in this bill, that for a valuable consideration, he purchased from said William A. Black, the one-third part of said Black's interest in all the aforesaid lands, the ferry and town lots, and the one-third part of the profits in any manner to be derived from said speculation; that said Wm. A. Black, promised to give plaintiff a written transfer to the same, but never did give one; but plaintiff alleged that he paid all the money which he had contracted with the said William A. to give to him for said interest of one-third of said William A. Black's share in said lands, ferry and town lots; plaintiff also referred in his bill to a written memorandum signed by said William A., and acknowledging a payment by plaintiff for said interest; a copy of which was appended to his bill (and is the same as the memorandum which is appended to the bill against the said William A. and Hunter.) The bill further alleged that the speculation had been very profitable; and that the said William A. refused to make said transfer to plaintiff, or to account to him for the sales of said lands and town lots, or the rent of said ferry. The prayer was, that he be compelled to execute a written conveyance to plaintiff, of the interest so alleged to have been sold and paid for; that he account fully to plaintiff for all lands sold, for the town lots, ferry rent, &c., and that he account for the value of, and settle for plaintiff's in-

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terest in the balance that are not sold ; and further, that such further relief be granted, as the nature and circumstances of the case might require, and as might be agreeable to equity and good conscience.

This plea in bar was demurred to, and the Court overruled the demurrer and sustained the plea ; whereupon plaintiff in error excepted.

McCAY & HAWKINS, for plaintiff in error.

STUBBS & HILL, *contra*.

By the Court.—BENNING, J delivering the opinion.

Was the judgment or decree sustaining the demurrer to the first bill, a bar to the second bill ? It is admitted, that it was, if the Court sustaining the demurrer, had jurisdiction of the first bill, and if the facts and the prayer of the first bill, are the same as those of the second.

First then, did the Court have jurisdiction ?

The plaintiff in error, by his counsel, insists, that the first bill was "a case" "respecting titles to land," and that as the bill was not brought in the county in which the land lay, the Court had no jurisdiction of it, although, it was brought in the county in which, the defendant resided.

It is true, that one object of the bill, was, to compel the defendant, to convey to the complainant, an interest in the unsold lots of the town of Oglethorpe ; but, it is equally true, that another, and probably a much greater object of it, was, to compel the defendant, to pay over to the complainant, his part of the profits, made by the defendant, from the sales of the sold lots of that town. And, in so far, as this last was the object of the bill, the proper county for the bill, was the county of the defendant's residence ; and, in that county, it was brought. There was then, at least as much reason that the bill should be brought in the county in which it was

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brought, as there was, that it should be brought in the other county; that in which the land lay. This being so, a Court of equity of either county, would have jurisdiction of the case.

Besides, there is not the same reason why cases in equity "respecting titles to land," should be brought in the county where the land lies, than there is, why such cases at common law should.

A Court of equity enforces its judgments, entirely, by acting on the person; not so a Court of common law; it can deliver possession of such lands only, as lie within the county in which it sits.

For these reasons, then, and another which will appear in the sequel, we think, that the Court *did* have jurisdiction.

Were the facts and the prayer of the first bill, the same as those of the second?

We think, that in substance, they were.

The *contract* on which, the first bill relies, is the very same as that on which, the second relies. It is true, that the second bill says, that the contract made a *sub-partnership* with one Hunter, as a *third* party to it; and, that the first bill does not say either of these things, but then it is also true, that that bill states the contract, and whether the contract amounted to a partnership or not, was a question of law. The contract was one, indeed, which, from its very nature, made the parties to it, sharers in losses as well as profits. And the failure in the first bill, to mention Hunter as a third party to the contract, is not sufficient to show, that it was not the same contract as that set up in the second bill.

The contract set up in the first bill, being thus, substantially the same as the contract set up in the second, we may say, that the *facts* of the two bills, were substantially the same.

Were the *prayers* of the two, the same.

The prayer of the first, was, for a conveyance to the complainant by the defendant, of the interest purchased by the

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complainant, in the lands that were to be laid out in town lots; for an account of the town lots sold; and of the ferry rent; and of the lots not sold; and for general relief.

The prayer of the second bill, was, for a full account of the "sub-partnership;" and, for general relief. This prayer though short, is fully as comprehensive as the prayer of the first bill, which merely went into particulars.

We think, then, that the facts and the prayers of the two bills, were in substance the same. Consequently, our conclusion is, that the judgment or decree in the first bill, was a bar to the second bill.

If the counsel for the plaintiff in error, are right, in this position, that the contract as stated in the second bill, makes a sub-partnership, and we are right in our position that this contract and that stated in the first bill, are substantially the same, then, their objection that the Court had no jurisdiction in the first bill, is removed, for land held by a partnership, is, they say, to be treated as personality, and any suit about personality, must be brought in the county in which, the defendant resides. This is the other reason why we think, that the Court deciding the first bill, had jurisdiction of the bill.

Judgment affirmed.

PAUL J. SEMMES, plaintiff in error, vs. SAMUEL BOYKIN,
adm'r, and others, defendants in error.

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[1.] A payment by the debtor to the creditor is, when there are more debts than one, to be applied to that debt to which, the debtor directs it to be applied, if he makes any direction.

[2.] In the eye of equity, all creditors are equally meritorious. Consequently, if there are several funds of the debtor, and there are some creditors hav-

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ing liens on one fund, and some, on another fund, and there is one creditor having a general and superior lien on all the funds, equity will not permit this creditor, to take the whole of his pay, out of any one of the funds, but will compel him to take it, *pro rata*, out of all of the funds.

[3.] Courts may require amendments to sworn bills, to be themselves sworn to.

In equity, from Muscogee county. Decision by Judge WORRILL, at November Term, 1858.

This was a bill filed by Paul J. Semmes, against Samuel Boykin, administrator of Narcissa Boykin, deceased, Francis M. Brooks, Sheriff of Muscogee county, and Robert S. Hardaway and others, judgment creditors of Edward T. Taylor.

The allegations of the bill, are substantially as follows:

That Paul J. Semmes held claims to the amount of \$15,000 against Edward T. Taylor, and on the day of September, 1856, Taylor gave Semmes a mortgage on a house and lot in the city of Columbus, to secure the payment of said amount.

And at the May Term of the Superior Court of Muscogee county, 1857, Semmes got a judgment of foreclosure on said mortgage; and on the 1st Tuesday in Nov. 1857, the said house and lot so mortgaged was sold by the Sheriff and brought about the sum of \$4,000, over and above costs, which sum is now in the Sheriffs hands for distribution.

At the August Term of the Superior Court of said county, 1853, one Narcissa Boykin, obtained a judgment against said Edward T. Taylor for \$2,000 besides interest and costs, and on this debt said Taylor was only security, and one John C. Leitner was the principal; said *f. fa.* is now in the hands of the Sheriff, claiming the money raised on the sale aforesaid.

The said Narcissa Boykin is dead and Samuel Boykin is her administrator. The said Jno. C. Leitner is also dead, and Hines Holt is his administrator.

Leitner in his lifetime was indebted to said Boykin in another considerable sum outside of the said \$2,000 debt.

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and to secure the payment of this other sum to the said Boykin, the said Leitner gave to said Boykin a mortgage on his interest in a manufacturing establishment in Columbus. The amount now due on this claim by Leitner's estate, plaintiff, Semmes, cannot prove without a *discovery* from Holt, the administrator. Leitner has been dead five or six years, and his estate is not yet administered. The administrator of Leitner represents his estate as being unable to pay its debts; but of its true condition plaintiff can prove nothing, without a *discovery* from Holt the administrator. The interest of Leitner in said factory has not been sold under said mortgage, nor has it been sold by the said administrator.

About the day of in the year 1856, Holt, the administrator of Leitner, had in his hands the sum of \$1,000, and not wishing to hold the same, made a deposit of it in the hands of the said Narcissa Boykin, to be applied to the payment of Leitner's indebtedness to her and in such manner as the law would appropriate it.

At the August Term of the Inferior Court of said county, 1857, Robert S. Hardaway, Henry Lockhart and others, obtained common law judgments against said Edward T. Taylor, amounting in all to about \$1,500; and they have their *fi. fa.* now in the Sheriff's hands claiming said money. On the 1st Tuesday in November, 1857, several lots of land in said county, were sold by the Sheriff, as the property of said Taylor, under the old *fi. fa.* of Boykin, which land sold for about \$1,000 and that sum is also now in the Sheriff's hands for distribution.

When Boykin obtained her judgment against Taylor in 1853, and since that time, said Taylor owned and possessed an interest in the Taylor Gin Factory in Columbus, which interest is sufficient to satisfy the \$2,000 *fi. fa.* of Boykin, and is subject to the same; and this is the only claim to which said gin factory is subject; and the claims of Semmes, Lockhart, and others, cannot reach it.

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The bill prays that Samuel Boykin, administrator be enjoined from receiving the money in the hands of the Sheriff, in satisfaction of the said execution, and that he be compelled by the decree of the Court, to proceed to collect said execution out of the estate of Leitner; that the said mortgage on the estate of Leitner be foreclosed, and that Boykin be enjoined from applying the said four thousand dollars, placed in the hands of his intestate by the administrator of Leitner, (Holt,) to the payment of said mortgage debt, but that the same be applied to the satisfaction of the execution against Taylor. That if said execution be not thus satisfied, that then the money in the Sheriff's hands, raised from the sale of Taylor's property, not embraced in complainant's mortgage, may be applied towards the payment of said execution held by Boykin against Taylor, in preference to the junior judgments against said Taylor; that the Sheriff and all said creditors be enjoined until the further order of this Court, &c.

Boykin, Hardaway, and Lockhart, demurred to this bill, which demurrer, after argument, the Court sustained and dismissed the bill as to said parties. To which decision complainant excepted.

Complainant then moved to amend his bill by adding thereto, "the allegations appended to the same, bearing date this (that) day." Defendants objected to this amendment on the ground, that the same was not sworn to. The Court sustained the objection, and refused the motion to amend.

To which decision counsel for complainant excepted.

INGRAM & RUSSELL, represented by B. HILL, for plaintiff in error.

DOUGHERTY, and E. A. NESBIT, *contra*.

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By the Court.—BENNING, J. delivering the opinion.

The Court below sustained the demurrer to the bill. The question, therefore, is, was there equity in the bill?

It may be assumed, that there was equity in the bill, if the facts stated by it, were such as to show, that Semmes had the right, to compel Boykin to seek satisfaction of his *fi. fa.* in whole or in part, out of some of the funds other than the fund raised by Semmes under his mortgage. Those funds were the \$4,000 paid by Holt as administrator of Leitner, to Mrs. Boykin; the money raised by the Boykin *fi. fa.* itself; the money raised by the other *fi. fas.*; the interest of Taylor in the gin factory.

Were the facts of the bill, then, such as to show, that Semmes had this right?

[1.] First, were they sufficient to show, that he had the right to compel Boykin, to seek satisfaction of his *fi. fa.*, in whole or in part, out of the \$4,000 paid to his intestate, Mrs. Boykin, by Holt, as the administrator of Leitner?

At the time when Holt thus paid the \$4,000 to her, she held two debts against his intestate, Leitner, viz: one, a debt against Leitner as principal, and Taylor as surety, it being the debt on which the Boykin *fi. fa.* aforesaid against Taylor, is founded; the other, a debt secured by a mortgage on Leitner's interest in the Coweta Falls Manufacturing Company. It is admitted, and is no doubt true beyond question, that if, when Holt paid this money to her, he directed her to apply it to the satisfaction of the former debt, in whole or in part, it was her duty so to apply it.

Now, he did, in fact, give this direction. The allegation in the bill, is, that he placed this sum, in her hands, "for the express purpose of being applied to the satisfaction of the said debts of the said Leitner, due to the said Boykin, one of them being, the same debt upon which, the said *fi. fa.* was issued against the said Taylor." Consequently, it was

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her duty to apply the sum, in *part*, to the payment of the former debt; and such an application of the money, if made, would, *pro tanto*, be a satisfaction of the *fi. fa.* against Taylor, as he was only a surety for the debt.

What part of the \$4,000, was it, that was to be so applied? Doubtless, a part proportioned to the part to be applied to the mortgage debt. What then was the part to be applied to the mortgage debt? That depended on a question, viz: whether in stating the proportion, the mortgage debt was to be taken at its full amount, or taken only at the balance of that amount remaining after the mortgaged property had been applied to it. This is a question, which it is not necessary to determine, as, whichever of the two things it be that is true, it is certain, that *some* part of the \$4,000, was to be applied to this debt on which Taylor was surety; and, if any part was to be so applied, that gave Semmes an equity. Consequently, we do not determine the question. We think, it proper, however, to say, that we incline to the opinion, that the balance of the mortgage debt was all that was to be taken in stating the proportion, for an Act of 1845, declares, "that in the payment of the debts of any deceased person or persons, no debts secured by mortgage, shall be entitled to any priority over any other debt of equal degree, except so far as relates to the property mortgaged;" (*Cobb* 297,) and we rather suppose, that permitting the whole mortgage debt, first to share with the other debt in the \$4,000, and then, to appropriate to itself, the whole of the mortgaged property, would be a violation of this act.

Secondly, were the facts in the bill, sufficient to give Semmes the right to require Boykin, to take any part of his pay of the old *fi. fa.*, out of the other money in the hands of the Sheriff, viz: the money on which the judgments younger than Semmes's mortgage, had a lien? We think they were.

[2.] In the eye of equity, all creditors are equally meritorious, and, therefore, equity, if left to itself, makes no discriminations among creditors, but puts them all on the same

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footing. Semmes, then, and these younger judgment creditors, must be permitted to stand on the same footing, with respect to the Boykin *f. fa.* which is older than his mortgage, and, older than their judgments. Consequently, Semmes has the right to require, that this *f. fa.* shall not take the entire pay of what may remain due on it after the proper part of the Leitner \$4,000 has been applied to it, out of the fund raised by his mortgage, but shall take a part of such pay, out of the fund on which the younger judgments have a lien; he has the right to insist, that these two funds shall contribute, proportionately, to the satisfaction of such balance due on the Boykin *f. fa.*

The result of what has been thus far said, is, that there was, in our opinion, equity in the bill in two respects; first, an equity to compel Boykin to take part satisfaction of his *f. fa.*, out of the \$4,000 paid by Holt to Mrs. Boykin; secondly, an equity to compel him to take part satisfaction, out of the money on which, the younger judgments had a lien.

Thirdly, were the facts in the bill sufficient to give Semmes the right to require Boykin, to go first on the interest of Taylor in the gin factory, for satisfaction of the old *f. fa.*? And, we think, that they were not.

[3.] It is obviously more advantageous to Boykin, on several accounts, to let him take satisfaction of his *f. fa.*, out of ready money, (the fund in the hands of the Sheriff,) than, to send him to raise a sum out of Taylor's property, from which to get the satisfaction. What equity has Semmes to ask, that Boykin shall be compelled to forego this advantage, which the law gives him? We know of none. The most that Semmes could ask, would seem to be, that Boykin should be compelled to transfer to him, the *f. fa.*, on his paying Boykin what was due on it, so that he, Semmes might, if he chose, try to make the money due on the *f. fa.*, from the interest of Taylor in the gin factory.

So much for the demurrer. We think the Court erred in not overruling it.

McCravy vs. Caskey.

The bill was a sworn bill on which, an injunction had been granted. The offered amendment, was, doubtless, offered as an amendment to warrant the continuance of the injunction. Such an amendment ought, we think, to be sworn to. Certainly to require it to be sworn to, is no abuse in the Court of the discretion it has, as to amendments.

We see no error, then, in the refusal to admit the unsworn amendment.

Judgment reversed.

**STERLING J. McCRARY, plaintiff in error, vs. SAMUEL CASKEY,
defendant in error.**

A promissory note dated in December, was expressed to be payable on the 25th day of December, next." Parol evidence was offered to show, that the 25th day of December, intended, was the 25th day of the same December, in which the note was made.

Held, That the parol evidence ought to have been received.

Debt, from Schley county. Decision by Judge WORRILL,
at August Term, 1858.

This was an action by Sterling J. McCrary, against Samuel Caskey, on a promissory note of which the following is a copy:

"By the 25th day of December next, I promise to S. J. McCrary, or bearer, two hundred and thirty-five dollars, for value received. This December 1st, 1852."

(Signed,) "SAMUEL CASKEY."

The note was endorsed with a credit for one hundred and fifty dollars, January 17, 1853.

McCravy vs. Caskey.

The second Count in the declaration, set out and averred that defendant made his certain other instrument in writing, called a promissory note, "whereby, by the twenty-fifth day of December next, (meaning the 25th day of December, then instant,) the defendant promised," &c.

The defendant pleaded the general issue and failure of consideration.

Upon the trial, plaintiff introduced the note and closed.

Defendant moved to dismiss the case upon the ground, that suit was commenced before the note was due.

The declaration was filed in the Clerk's office, 21st December, 1853, and defendant served 9th January, 1854.

Plaintiff offered to prove that the note, though payable the 25th day of December next, and dated the first day of the same month, was so written by mistake, and was in fact, intended to be payable the 25th day of December, then instant.

The Court refused to admit this proof, and dismissed the action, and plaintiff excepted.

McCAY & HAWKINS; COOK & MONTFORT, for plaintiff in error.

E. H. BEALL, and SCARBOROUGH, *Contra.*

By the Court.—BENNING, J. delivering the opinion.

We think, that the parol evidence was admissible to show the mistake in the time of the maturity of the note. It is conceded, that such evidence would be admissible for that purpose, if the case were in equity, and there can be no doubt, that it would. But why should we drive the plaintiff into equity, if he can, as well, obtain redress at law. There is no reason why we should. Indeed there is a statute which says, that we shall not. It says, that in such a case, a plain-

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tiff "shall not be held to proceed with the forms of equity." That is the statute of 1820, giving to plaintiffs the right to sue at law, in all equity cases, if he "conceives," that he can "establish" "his claim" "without resorting to the conscience of the defendant."

Judgment reversed.

MARION BETHUNE, as Ordinary of Talbot county, for the use of JOHN T. FANNING, et al. plaintiff in error, vs. THOS. GREEN, defendant in error.

A guardian is responsible for only such property of his wards, as is accessible to him.

Debt on Bond. Tried before Judge WORRILL, September Term, 1858. Talbot Superior Court.

Bryant Fanning, the father of plaintiff's usees, was the drawer in the Land Lottery of 1827, of two lots of land viz : lots number sixteen in the tenth district of Troup county, and number fifty-four in the ninth district of Muscogee.

No grants were taken out during the drawer's life, Bryant Fanning died about the year 1830 in the county of Wilkes; and Welcome Fanning and Thomas Green Sr., obtained letters of administration on his estate, in the same year. An order was obtained, by the Administrators, from the Court of Ordinary of Wilkes county of which the following is a copy: "It appearing to the Court that due notice has been given of an intended application for leave to sell the real estate of Bryant Fanning deceased ; on motion, ordered that the administrator's be and are hereby, authorized to sell the

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estate of said Fanning upon a credit of twelve months, after giving legal notice of said sale."

There was no sale or other administration of the two above named lots of land.

In the year 1841, the defendant Thomas Green, took out letters of guardianship of the persons and property of the plaintiff's usees, and gave bond and security according to law; during the guardianship of the defendant, and the minority of his wards, the aforesaid two lots of land were suffered to revert to the State, and were granted to others under the act of the Legislature passed in 1843.

This suit was brought on the guardian's bond and the foregoing facts alleged as a breach of it.

On the trial of the cause, the Court below charged the jury that the guardian was not liable under this statement of facts and that no one was liable for the loss of the land, but the administrators of Bryant Fanning's estate.

SMITH & Pou, for plaintiffs in error.

STUBBS & HILL; WELLBORN, JOHNSON & SLOAN, *contra*.

By the Court.—BENNING, J. delivering the opinion.

Was the charge of the Court below right?

We think it was.

The duty imposed on the guardian, by his bond, was, to "take due and lawful care of the" "property" of his wards.

The property; this must mean, merely, such property of the wards, as was accessible to him.

Were the lands, in question, accessible to him? We think not. There was an order authorizing the administrators of the father of the wards, to sell the lands. This order gave to those administrators the right to retain the lands, as against the guardian, that they might sell the lands; and consequently, the order would have been an answer to any suit for the lands, brought by the guardian, against them.

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The presumption is, that while that order stood, the interest of the creditors and distributees, required, that the lands should be sold.

And then the lands were not granted, and the duty of granting them, was on the administrators, if not exclusively, at least, more properly, than on the guardian, for the expense of the grant, was a charge on the whole estate, rather than on the share of any distributee, and it was only the administrators, that had at command the whole estate.

Taking the case, then, as it appears in the record, we think, that the charge of the Court below was right.

Judgment affirmed.

*Judge McDONALD did not preside in this case, on account of indisposition.

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ISAAC BROOKING, tenant &c., plaintiff in error, vs. Lessee of Wm. P. DEARMOND, for use &c., defendant in error.

- [1.] A copy grant ought not to be received as evidence, without an excuse for the non-production of the original.
- [2.] A grant was issued in the name of Boswell Cook, and a certificate of the Surveyor-General was offered in evidence, to show that the grant, by mistake, had been issued in the name of Boswell Cook, when it should have been issued in the name of Roswell Cook.
Held, That under the Act of 1857, for the admission of parol evidence to show mistakes in grants, the certificate was admissible.
- [3.] A man who has no title, cannot recover in ejectment, although he alleges, that he demises to JOHN DOZ, for the use of another man, who does have the title.
- [4.] A judgment in one suit, is not a bar to another suit, if the parties in the two suits are not the same; or, if, although the parties in the two suits are the same, they sue, or are sued, in one suit, in a right different from the right in which, they sue, or are sued, in the other.

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Ejectment, from Randolph county. Tried before Judge KIDDoo, November Term, 1858.

This was an action of ejectment by John Doe upon the demise of William P. Dearmond, against Richard Roe, casual ejector and Isaac Brooking tenant in possession, for lot of land no. 79, in the 8th district of Randolph county. The declaration contained a demise to John Doe from Wm. P. Dearmond for the use of John R. M. Neal and laid no other demise.

At the trial plaintiff offered in evidence a copy grant from the State to Boswell Cook, for the lot in controversy; defendant objected to the introduction of the copy, until the loss of the original was shown, or the failure to produce it accounted for. The Court overruled the objection, and allowed the copy to be read, and defendant excepted.

Plaintiff next offered and read in evidence a copy deed from Cook to his lessor Dearmond, for said lot, dated 20th Sept., 1829: proved the possession of defendant at the commencement of the suit and the value of themesne profits, and closed.

Defendant offered and read in evidence a deed from Dearmond to John R. M. Neal for the lot in dispute, dated 29th August 1850—before suit commenced. He then offered and read the record in an ejectment case in which said Neal was plaintiff and said Brooking was defendant, for the same land now sued for, by which it appeared that at the April Term, 1855, of Randolph Superior Court, there was a verdict for the defendant. This proof was in support of defendant's plea of former recovery &c. Defendant next offered in evidence the certificate of the Surveyor General, to show that Boswell Cook did not draw said lot of land, but that by mistake the grant was issued to Boswell Cook, instead of to Roswell Cook. Plaintiff objected to the introduction of this certificate; the objection was sustained by the Court, and the certificate repelled, and defendant excepted.

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After reading the depositions of two witnesses, Kerr and Mann, defendant closed.

Plaintiff in reply, offered in evidence an agreement between R. G. Carithers and A. Hood, the object of which was to show that in the ejectment case between J. R. M. Neal and defendant, the verdict and judgment in which, were plead and relied upon as a bar to any recovery in this suit, there had been a *rule nisi* for a new trial which was still pending, undisposed of by the Court. To the introduction of which defendant objected. The Court overruled the objection and defendant excepted.

The Court amongst other things, charged the jury, that they might find for the plaintiff, although he had conveyed the land to Neal before the commencement of the suit, and without any demise from Neal or in his name, provided they should be satisfied that Neal, was the real though not the nominal, party in interest.

To which charge defendant excepted.

Defendant requested the Court to charge the jury, that they could not find for plaintiff if there was no demise laid from Neal, and the title had been shown out of Dearmond, before the commencement of the suit.

The defendant further requested the Court to charge, that if the jury believed, that there had been a former recovery by Brooking in another suit, in the statutory form brought by Neal against Brooking as pleaded, that then they must find for the defendant, if they were satisfied that Neal was the real party in this suit.

Which charges the Court refused to give, but charged that if Neal was the real party in interest, though not nominally a party, the jury might find for his benefit in the name of Dearmond, although title may have passed out of Dearmond before suit brought; that as to the recovery by Brook-

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ing against Neal in the other suit referred to, the agreement between Carithers and Hood operated as a *rule nisi* and superseded the judgment in that action.

To all of which charge and refusals to charge defendant excepted.

The jury found for the plaintiff, whereupon defendant moved for a new trial, on the ground of error in the rulings, charges, and refusals to charge excepted to above.

The Court refused to grant a new trial and defendant excepted.

DOUGLASS & DOUGLASS; and W. C. PERKINS, for plaintiff in error.

HOOD & ROBINSON, *Contra*.

By the Court.—BENNING, J. delivering the opinion.

[1.] It was wrong in the Court, as we think, to admit the copy grant to the jury, without requiring an excuse for the non-production of the original, either the excuse sanctioned by the rule of Court, or that sanctioned by the rule of the common law. See *Sutton vs. McLeod*, decided at Savannah, January Term 1859.

[2.] It was also wrong in the Court, as we think, to exclude from the jury, the certificate of the Surveyor General. That certificate went to show, that the grant was, by mistake, in the name of Boswell Cook, when it should have been, in the name of Roswell Cook. And the state of things might have been, that there was never any such person, as Boswell Cook, but was such a person as Roswell Cook. If that was the state of things, then it could not be, that any right could ever have vested in Boswell Cook, and, by consequence, it could not be, that any right could ever have been derived from Boswell Cook; Boswell Cook would be a nonentity, and a nonentity can neither receive nor impart.

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Deeds in the name of a nonentity, must of necessity, be the work of some one assuming, or forging, the name of the nonentity. But under deeds so manufactured, no rights would vest as against the true owner. These things being so, the certificate going to show the mistake aforesaid, was rendered admissible by the Act of 1857, providing for the admission of parol evidence to show mistakes in grants.

Did the Court err in allowing Dearmond to read as evidence, the agreement entered into, in the first ejectment case, by Hood, the counsel for Neal, and Carithers, the counsel for Brooking? This agreement formed a part of that case, and as the Court had permitted Brooking to read in evidence, the other part of the case, it was but a matter of course, to let Dearmond read in evidence, this part, so, that the whole case might be before the jury. What the agreement was to be worth, when thus read in evidence, was another question; a question which, as it will be seen in the sequel, need not be decided.

Was the charge right? The charge was, that the jury might find for the plaintiff, Dearmond, although he had conveyed the land to Neal, before the commencement of the suit, and there was no demise laid in the name of Neal, provided, they believed, that Neal was the real, though not the nominal, party in interest.

This proviso we take to amount to this; provided the jury believed, that the action was brought by Dearmond *for the use of Neal*.

This being so, the charge amounts to this, that a man may recover in ejectment, although he has no title whatever, if he sues for the use of another man, who has the title. We are not aware of any law to authorize such a charge as this. In every case, as far as we know, in which the law allows one person to sue for another, some title must be in the former person. He must have the legal title, and the other person only the equitable. The payee of a bond, or of a promissory note not negotiable, who nevertheless assigns the bond, or

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the note, may sue for the use of the assignee. But he has the legal title still in him, and the assignee has acquired only the equitable title. Whether there is any case in which one person may sue in *tort*—in trespass—for the use of another, we are not prepared to say. But we do think, that if there is any such case, it must, at least, be a case in which, the person so suing, must have some title of some kind.

Now if the charge had been, that, although Dearmond having the title in him, had conveyed to Neal, yet Dearmond ought nevertheless to recover, provided, the conveyance to Neal was, on some account, void, the charge would have been right; that is it would, if authorized by the evidence; for, in that case, the conveyance to Neal being void, would count for nothing, and the entire title would be in Dearmond.

We think, then, that this charge of the Court, was erroneous. If the legal title was in Neal, why did he not sue in his own name? That would have been the regular mode; and would have been a mode by which, he would have obtained everything that he ought to have obtained. If the legal title was not in him; if the deed to him was void, then the charge, besides not being law, was not suited to his case, for it assumed that the title had been “conveyed” by Dearmond to him; that is, it assumed, that the legal title was in him.

. From what has thus been said of the charge, it is apparent that we must consider the first request to charge, of Brooking's counsel, to have been proper.

The other request of his counsel, was, that if there was a former recovery by Brooking in a suit in the statutory form, brought by Neal against Brooking, then the jury must find for the defendant, provided, Neal was the real party to the suit on hand. We suppose that this proviso means; if the suit was brought *for the use of* Neal. This request, the Court rejected, on the ground, that the agreement heretofore mentioned, made by the counsel in the former suit, superseded

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the judgment in that suit. Whether this was a sufficient ground or not, we will not undertake to say, as we think, that there was another ground which was clearly sufficient.

[4.] And that ground was the fact, that the plaintiffs in the two suits, were not the same; or if the same he was not suing in the same right. In the former suit, the plaintiff was Neal; in the latter, the plaintiff was Dearmond. What the judgment in the former suit said, was, that Neal was not entitled to the land; but this was not saying that Dearmond might not be entitled to it. No; it was not saying so, even if Neal was claiming under Dearmond, for it might have been, that his deed from Dearmond, was, for some cause, void, in which case, his failure to recover, would not only be entirely consistent with Dearmond's having the title, but would really be evidence of Dearmond's having the title, the void deed never having had efficacy, to draw the title out of Dearmond.

The fact that the second suit was for the *use of Neal*, could make no difference.

For one of two things must be true; 1st, that Dearmond had the entire title, both legal and equitable; or, 2dly; that Dearmond had the legal title, and Neal, the equitable. And if it was the first that was true, then the second suit was entirely Dearmond's; as much so, as it would have been, if the allegation that it was for the use of Neal had not been in the declaration. And such allegation would be evidence merely, of a purpose in Dearmond, to bestow a gratuity on Neal. And if the suit was Dearmond's, to the full extent, then, there can be no pretence, to say that any judgment in a suit in which, not he, but Neal was the party, could be a bar to the suit.

And if it was the second of the two things, that was true, then, although we might say, that the suit was in reality Neal's suit, yet it would be a suit in which, he would be suing in a right different from that in which he sued in the

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first suit. He would be suing in the right of *Dearmond*—be asserting *Dearmond's* legal title—whereas, in the first suit, he sued in his *own* right; he asserted his own equitable title, which being an insufficient title to sustain a suit for land, he failed in his suit. And when a man sues in one right, and fails, that is no reason why he may not sue again, in another right. If a man sues as executor and fails, may he not nevertheless, sue again in his individual capacity? most certainly he may. So, if a draft not negotiable, payable to **A.** is assigned to **B.** and **B.** sues on it in his own name, and fails for lack of having the legal title, is that a bar to another suit by him, in the name of **A.** for his use? Assuredly not; consequently, although *Neal*, suing in his own right, may have failed, that was no bar to his suing again in the right of *Dearmond*.

These, then, are the reasons, why we think, that the Court was right in refusing to charge, that the judgment in the first suit was a bar to the second suit.

New trial granted.

R. W. SMITH, plaintiff in error, vs. **JOHN JOINER**, defendant in error.

[1.] The provision in the Constitution of 1798, conferring power on the Superior Courts to correct errors in inferior judicatories, by writ of *certiorari*, does not require an Act of the Legislature to enforce it. It is explicit enough for that purpose.

[2.] If it be alleged that material alterations have been made in the exceptions to the decision of an Inferior Court, and proof be offered to support such allegations, it is error in the Court to refuse to hear it.

[3.] A bond for an attachment need not be taken by, or offered for approval by the magistrate who issues the attachment. It is sufficient if taken by any other magistrate. Such bonds, if objectionable, may be amended.

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Certiorari, from Taylor county. Decision by Judge WORRILL, at October Term, 1858.

John Joiner sued out an attachment against Russell W. Smith, returnable to the Inferior Court of Taylor county, on a promissory note.

The Inferior Court, on the trial, upon motion of defendant's counsel, dismissed the attachment on the ground that the attachment bond given by the plaintiff, was not attested by the Justice who issued the attachment. Plaintiff applied for a *certiorari*, which issued, to correct said judgment.

The case being called in the Superior Court, defendant's counsel moved to dismiss the *certiorari*, upon the following grounds:

- 1st. Because *certiorari* would not lie in the case.
- 2d. Because the exceptions taken to the decision of the Inferior Court, had been interlined and materially changed since they were signed—which interlineations and alterations defendant offered to prove.

The Court overruled the objections and refused the motion to dismiss, and defendant excepted.

Defendant then moved that the case be sent back to the Inferior Court, to correct said interlineations. The Court refused this motion, and defendant excepted.

After argument, the Court reversed the decision of the Inferior Court, because the said Court erred in dismissing the attachment, on the ground that the bond given by plaintiff in attachment was void—the Court holding that it is not necessary or essential to the validity of such bond, that it should be attested by the officer issuing the attachment. To which decision counsel for defendant excepted.

JAMES T. MAY, for plaintiff in error.

BLANDFORD & CRAWFORD, *contra*.

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By the Court.—McDONALD, J. delivering the opinion.

[1.] It is objected that a *certiorari* will not lie in this case. The Inferior Court is a judicatory inferior to the Superior Court. The Constitution of 1798 confers express power on the Superior Courts to correct errors in inferior judicatories, by writ of *certiorari*. The doctrines of the common law, in regard to writs of *certiorari*, have nothing to do with, or control over, proceedings on the writ, under the Constitution. The Constitution is so explicit, though very short, as not to require the aid of legislation to give it effect. The writ of *certiorari* is a process which carries the whole cause, and the proceedings under it, to the higher Court; and that Court can have no higher commission than the Constitution, to examine the record and correct the errors therein, if any.

This Court has decided that there are cases which are not embraced in the section of the Judiciary Act of 1799, which relates to *certioraris*. That Act was, no doubt, designed to carry into effect the provision of the Constitution in regard to the correction of errors in inferior judicatories, but it cannot abridge the constitutional rights of litigant parties. I have no doubt that the framers of the Judiciary Act intended that a party, to entitle himself to a writ of *certiorari*, should make his exceptions to the proceedings in writing, while the case is in progress, and sign them, or have his counsel to sign them. If the Court overrule them, he would then be entitled to a writ of *certiorari*, provided the Judge of the Superior Court should deem them sufficient; and such I believe to be the construction of the Act. But it is not necessary to consider that subject further.

[2.] When the cause was taken up in the Superior Court, it appeared that the exceptions taken to the decision of the Inferior Court had been interlined and materially changed since they were signed and certified by the Justices, and plaintiff in error offered to make proof thereof. The Court refused to admit the proof. This was a grave charge, and if

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true, avoided the proceedings, and the Court ought to have heard the evidence. The alterations, if material, may have changed the rights of the parties. This Court cannot lay down a rule, or sustain one, if laid down in the Court below, which would preclude it from enquiring into the state of its records, and protecting them from corruption by interested parties. The judgment of the Court below must be reversed, on the ground that said Court refused to hear the evidence, with instructions to hear the proof, and after hearing it, to reconsider the case.

[3.] The Court below, after considering the writ of *certiorari* and the return made thereto, reversed the decision of the Inferior Court dismissing the attachment, and exception was made thereto. It is not necessary that the bond for an attachment should be given in the presence of, or be approved by, the magistrate who issues the attachment. *Sec. 5 of Attachment Act of 1856, pamph. 26.* If defective, it may be amended. *Sec. 53, same Act.*

Judgment reversed.

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¹³⁹ JOHN DOE, *ex dem.*, CHARLES J. DAVENPORT, et al., plaintiff in error, vs. RICHARD ROE, casual ejector, OBADIAH R. HARRIS, defendants in error.

[1.] It is not error for the Court to allow irrelevant testimony to be withdrawn from the jury.

[2.] Plaintiff may introduce the sayings of a person through whom the defendant claims title in an action of ejectment, to prove the loss or destruction of a deed, to lay the foundation for introducing secondary evidence of its contents; but if such secondary evidence be admitted, notwithstanding the rejection of such evidence, it is no ground to reverse the judgment of the Court upon.

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[3.] A tax execution against a tax collector and his surety, must be issued by the Comptroller General; and when the Sheriff who made a sale under it, delivers it to the Solicitor General, the presumption is that he delivered it at that office, and before secondary evidence of it can be given, an enquiry and search should be made there for it.

Ejectment. Tried before Judge WORRILL, October Term, 1858, Taylor Superior Court.

Suit was brought by the plaintiff in error, on the several demises of John L. Brooks, Charles J. Davenport and others, against the defendants in error, for a lot of land in Taylor county. On the trial, plaintiff read in evidence a copy plot and grant from the State to said John L. Brooks, of the land in dispute. He then proved the possession of the premises by the tenant, Harris, at the commencement of the suit. He then read in evidence a deed from Raymond Davenport to his son, Charles J. Davenport, dated 5th December, 1839, and closed his case. The suit was commenced in August, 1857.

Defendant then read in evidence a deed to said lot of land, from B. Lockhart to one Stuckey, dated 31st December, 1850; and then proved that said Stuckey, either by himself or his tenants, had been in possession of the land ever since that date. B. Lockhart was in possession of the land the year before he sold it to Stuckey.

The testimony of B. Lockhart, taken by commission, was then read by defendant. [This witness had been released by Stuckey, from liability on his warranty.] Witness went on the land in dispute in December, 1848; bought the land from J. C. Lockhart; got a deed from J. C. Lockhart, and had made diligent search for it, but could not find it; supposed the deed was inadvertently burned by witness, along with some papers that were worthless; did not remember who were the witnesses to the deed; witness remained on the land from December, 1848, until he sold it to Stuckey, at which time Stuckey went into possession of it; William

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Sears bought the land in dispute at Sheriff's sale, at Tazewell, (then the site of the court-house of Marion county,) in 1839 or 1840, and remained in possession, by tenant, about eight years, and until the death of said Sears, when the land passed to Julius C. Lockhart, under a bequest in the will of said Sears; had heard Sears say, his deed from the Sheriff was burned when the court-house at Tazewell was destroyed by fire. Defendant here closed his case, having first stated that he rested his title upon adverse possession, commencing in Julius C. Lockhart, and asking leave to withdraw from the jury all that portion of B. Lockhart's testimony which referred to the Sheriff's sale at Tazewell, and the sayings of Sears as to the destruction of the deed. The Court allowed the withdrawal of the testimony, and plaintiff excepted.

Plaintiff then proposed to read in evidence the testimony so withdrawn, his counsel stating in their places that they expected to prove the contents of the burnt deed, and that the land was sold by the Sheriff as the property of said Raymond Davenport. Defendants objected to the evidence; the Court sustained the objection, and plaintiff excepted.

Plaintiff then introduced the will of said Sears, dated April, 1848, and admitted to probate in August, by which said land was devised to Julius C. Lockhart.

Mark H. Blanford, Esq., swore: That he had searched the offices of the Clerk of the Superior and Inferior Court of Marion county for the *fi. fa.* under which said land was sold, and the record of the Sheriff's deed, and could not find them; that most of the records and papers belonging to said offices were destroyed when the court-house was burned in 1845.

Plaintiff then proposed to prove by *Jeremiah Wilchar*, that in 1842 or 1843 he, as Deputy Sheriff of Marion county, levied on and sold said lot of land as the property of Raymond Davenport, by virtue of an execution in favor of

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the State of Georgia against one Hammock, a defaulting tax collector, and Raymond Davenport, his security; that said Sears was the purchaser; that a regular Sheriff's deed was made to Sears; that Randal W. Martin was one of the witnesses to the deed, and now lived in Florida; that he did not remember who the other witness was; that he delivered the *fi. fa.* (he thinks, but is not certain about it,) to Lang Lewis, who was then Solicitor General. To which testimony defendant objected, unless the plaintiff would produce the *fi. fa.* under which the land was sold; and the Court sustaining the objection, plaintiff excepted.

Plaintiff then took a voluntary nonsuit, reserving the right to take the case to the Supreme Court by writ of error.

BLANFORD; OWEN; REESE, for plaintiff in error.

SMITH & POU; CORBITT, *contra.*

***By the Court.*—McDONALD J. delivering the opinion.**

[1.] The first assignment of error is on the decision of the Court allowing the defendant to withdraw that part of B. Lockhart's evidence which related to the Sheriff's sale at Tazewell, and the sayings of Sears as to the destruction of the deed from the Sheriff. The part of the evidence withdrawn was not material to the issue to be tried, or, if at all material, it was favorable to the party making the motion, and could not possibly prejudice the plaintiff. The deed was a deed from the Sheriff to Sears, but the evidence did not disclose the name of the defendant whose property it conveyed. The evidence that the deed was burnt, was not relevant to the issue, and was only valuable as proof to the Court on a motion to introduce secondary evidence. The Court violated no rule of law in allowing irrelevant evidence to be withdrawn from the jury.

[2.] After the evidence was withdrawn by the defendant, the plaintiff offered to re-introduce it, for the purpose ex-

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plained in the Reporter's statement of the case. If it was offered as evidence to be considered by the jury, it was inadmissible; but we see no objection to it as evidence to the Court to lay the foundation of introducing secondary testimony. The defendant claimed title through Sears, and Sears was dead. But the defendant was not injured by this ruling of the Court. The evidence had been before the Court and jury, and withdrawn from the jury, but the Court, perhaps, felt authorized to hold that the original deed had been accounted for sufficiently to authorize the admission of evidence of its contents; for that evidence was given by the witness, Wilchar, who was the officer who sold the land, and it was objected to only because the tax execution had not been produced. Was the evidence properly rejected on that account? Had the Sheriff's deed been in Court, it could not have been introduced without the production of the tax execution as the authority to the Sheriff to sell, or proof of its contents, if the absence of the original execution had been accounted for.

[3.] The plaintiff attempted to account for the original execution, but we think with the Court below, that he failed to do it. His counsel had searched the offices and records of the Clerks of the Superior and Inferior Courts of Marion county for the execution and deed, and could not find them. The court-house and records had been burnt. The witness, Wilchar, testified that he made a proper return of the *f. fa.*, and he thinks delivered it to the Solicitor General. The execution was issued from the office of the Comptroller General, and ought to have been returned there. The Solicitor General must be presumed to have done his duty and delivered the execution to the proper officer, or deposited it in his office. That officer was not examined. Hence, we sustain the judgment of the Court below.

Judgment affirmed.

Dean vs. Biggers.

SEABORN L. DEAN, plaintiff in error, vs. **LORENZO M. BIGGERS**, defendant in error. 118

D. applies for administration on H's estate. In opposition, a will is produced, but the will does not convey the entire estate of H. and the ordinary grants to D. administration on that part of the estate disposed of by the will. B. resisted before the Ordinary the grant to D., and appealed to the Superior Court, where he moved to dismiss the application of D. for the administration. The Court granted the motion.

Held, That, inasmuch as the executor of the will, was not known in the record, or that he had propounded the will, or that he would administer if the will were established, the Court below erred in dismissing the application.

Application for letters of administration, &c., from Harris county. Decision by Judge WORRILL, at October Term 1858.

Seaborn L. Dean applied for letters of administration on the estate of Elizabeth Holcombe, deceased, when a will was produced for probate, and upon proof was admitted to record as the last will and testament of said Elizabeth—G. W. Epps being the executor thereof. An appeal was taken from the judgment of the Ordinary admitting said will to probate, by **Dean**, a son and heir at law of deceased. The Ordinary appointed **Dean** administrator *pendente lite*, as to all the estate and property named in the will, and appointed him administrator upon all the estate of deceased not named in said will, from which order **Lorenzo M. Biggers** appealed.

At the October Term, 1858, of the Superior Court of Harris County, this latter appeal came on to be heard, when **Dean** moved to dismiss the appeal upon the ground that **Biggers** had no right to enter an appeal; he being in no way interested in the estate of said Elizabeth Holcombe. The Court refused the motion.

Dean then proved that he was the son and heir at law of deceased and a resident of Harris county. That deceased owned property not mentioned or disposed of by the paper purporting to be her will; one or two negroes, carriage and

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buggy, household furniture, stock, and that she died in possession of a plantation in said county, using it as her own.

After the close of this testimony, the Court on motion, dismissed Dean's application for letters of administration, and his counsel excepted.

RAMSEY & CARITHERS, for plaintiff in error.

No counsel appeared for Biggers.

By the Court.—McDONALD J. delivering the opinion.

In opposition to the application of the plaintiff in error for administration on the estate of Mrs. Holcombe, a will was produced and admitted to probate by the Ordinary, who nevertheless granted administration to Dean on a part of the estate, which did not pass by Mrs. Holcombe's will. G. W. Eppes was named as executor in the will. He does not appear to have been a party in the Court of Ordinary, either in the proceeding to prove the will or to resist the grant of administration to Dean, but Lorenzo M. Biggers alone appeared to contest the grant. He appealed from the decision of the Ordinary making the grant, and on the appeal moved to dismiss the application of the plaintiff for letters of administration. The Court sustained the motion, and to that decision exception was taken.

For the plaintiff in error, it is contended that Biggers is an interloper in the case, without an interest of any kind, and that he ought not to be heard. It seems that his right to appear before the Ordinary was not disputed. He may be a creditor, or he may have shown, if he had been called on at the proper time, a legal right to appear. He ought to have shown his right in the first instance, but as his appearance and opposition was not then objected to, but acquiesced in, it is too late now to question it in the manner that it is met here—by a simple objection that his interest does not appear in the record.

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It no where appears in the record that Eppes, the named executor, presented the will for probate, and if he did not, there cannot be the slightest objection to the grant of administration made to the plaintiff in error, and much less to his application for administration. Under a general application for administration a special grant may be made; and if all the property of the testator is not conveyed by the will, there ought to be a special administration as to the part that does not pass by it, if there has been no executor appointed, or if the executor or executors do not qualify. If the executor qualifies, he is entitled to and bound by the strong implication of the statute, to administer on the entire estate, but he is required to hold the undevised real and personal estate in trust for the distributees or next of kin of the deceased testator or testatrix. *Cobb*, 327. An administrator with the will annexed, can have no such authority by the law or the will. He can have it but by grant from the Ordinary only, and that by special grant.

The will in this case has been caveat-ed. If the executor propounded the will and it should be finally established on his qualification, the letters granted to Dean should be superseded, and the executor should administer the entire estate, otherwise the grant should stand.

The Court erred in dismissing the application of plaintiff in error for the administration.

Judgment reversed.

Hunter vs. Blount.

**JIMSEY B. HUNTER, plaintiff in error, vs. JOSEPH E. BLOUNT,
defendant in error.**

To prove a Diploma given to a Physician by a Medical College of another State,
the legal existence of the College must be produced.

Complaint on account, in Schley Superior Court. Tried
before Judge WORRILL, at August Term, 1858.

This was complaint, on an account for medicinal services
rendered by Joseph E. Blount, against Jimsey B. Hunter.

The defendant pleaded, that plaintiff had never received a
license to practice medicine from the Medical Board of the
State of Georgia, nor a Diploma from any Medical College
in the United States, and that he was not entitled to charge
for services rendered as a physician.

Upon the trial, plaintiff proved his account by the pro-
duction of the book of original entries; that the entries
were in his own handwriting, and that he kept no clerk;
and further proved by two witnesses that he kept correct
books.

Plaintiff then offered in evidence his Diploma, or a parch-
ment writing purporting to be a Diploma, from the Medical
College of Philadelphia, signed by certain persons as Presi-
dent, Vice President, and other officers of said college, with
a seal bearing the name and inscription of the Medical Col-
lege of Philadelphia. Said parchment writing being in the
Latin language.

The defendant objected to the admission in evidence of
said parchment, unless the plaintiff would first prove that
the same issued from the Medical College of Philadelphia,
and that the seal attached thereto, and the signatures of the
officers were genuine.

The Court overruled the objection and admitted the Diplo-
ma, without such proof, and defendant excepted.

Defendant then objected to the said parchment going to

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the jury as evidence, unless the writing therein was translated into English.

The Court overruled the objection and let the parchment writing go to the jury, without being translated, and defendant excepted.

The jury found for the plaintiff. Whereupon defendant tendered his bill of exceptions, assigning as error the decisions above excepted to.

BLANDFORD & CRAWFORD, for plaintiff in error.

DAVIS & HUDSON, *contra*.

By the Court.—McDONALD, J. delivering the opinion.

By the Act of February, 1854, physicians who have been graduated by any Medical College in the United States, and have Diplomas, may practice medicine and charge for their services, otherwise they cannot without a license from the Board of Physicians in this State. To the plea of the defendant in the Court below, that the plaintiff was not a licensed or graduated physician, the latter in reply offered in evidence his Diploma from the Medical College of Philadelphia. It was objected to, unless the plaintiff would show that the same was issued from a Medical College of the United States, and was duly executed by the proper officers. The Court below overruled the objection and admitted it in evidence, and error is assigned on this ruling of the Court. The plaintiff is bound to prove that the Diploma which he offered was given by a college existing at the time, and the charter or act of incorporation must be produced for that purpose. The legal existence of a body corporate in another State cannot be recognized here without proof.

Judgment reversed.

Binion et al. vs. Miller, adm'r.

WILLIAM H. BINION, and others, plaintiffs in error, vs. EMSON MILLER, administrator, defendant in error.

- [1.] If an administrator manage his intestate's estate fairly and honestly, but neglects to make his returns so as to exhibit the state of his accounts in the Ordinary's office, he is not on that account, liable to pay a higher than the ordinary rate of interest chargeable against an administrator; but if, on demand of a distributee, he fails or refuses to make a full exhibit of his accounts, and come to a settlement, he subjects himself to the costs and expenses of a suit which his default may have made necessary.
- [2.] If a receipt be given by a guardian to an administrator for negroes expressed to be in full of his ward's distributive share of the estate, and it is insisted that it is expressed to be in full, because all other accounts were balanced and settled, which is nevertheless disputed by the wards, whether the receipt was in full is a question for the consideration of the jury.
- [3.] To bind infants by a settlement made by the administrator with their guardian, it must be a full and final settlement without fraud, or if fraudulent, the fraud must have been known to the infants, and they must have acquiesced for the period of the statutory bar.

In Equity, from Schley county. Tried before Judge WORRILL; and motion for new trial refused, at August Term, 1858.

This was a bill filed by William H. Binion, and Thomas M. Bailey and wife, against Emson Miller, administrator, in right or stead of his wife, of the estate of William Binion, deceased, late of Columbia county. The bill was for an account and distribution of said estate; complainants William H. Binion and Mrs. Thomas being the children of intestate, and Miller, the defendant, being the husband of the widow of deceased, and administrator in right thereof.

Defendant answered the bill, and denied that he had any of said estate in hand unaccounted for; that the same had been distributed equally between defendant in right of his wife, the widow of the intestate, and complainants, whose share upon settlement made in 1836, had been paid and turned over to their guardian and a receipt in full taken and made an exhibit to the answer.

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It appeared that William Binion the intestate died in Columbia county in the year 1823; that his widow administered on the estate and sold some of the same to pay debts; that in 1835, she intermarried with defendant, then of Monroe county, who received all the estate of deceased, then in the hands of his wife, as administrator appointed in her right; that he soon after sold all the perishable property and had the negroes partitioned between complainants and himself in right of his wife; that he had the estate transferred to Monroe county, and made his returns to the Ordinary of said county; that on the 21st December, 1836, defendant delivered the negroes to the guardian of complainants, Robert Rozar, and took from him receipts, as follows:

“Received of Emson Miller, administrator in right of his wife, of the estate of William Binion, deceased, three negroes, Sharrott, Harriet and Dilsey, valued at sixteen hundred dollars, and allotted to William Binion, orphan of said William Binion, deceased, as his distributive share of the estate of said deceased. Said negroes being received by me in full of the distributive share of said estate due said orphan.

December 21, 1836.

(Signed,) ROBERT ROZAR, Guardian of
Wm. Binion.

There was another receipt in the same terms and words, of same date, for three negroes, valued \$1,675, allotted to Laura Ann Biniou (now Mrs. Baily.)

It further appeared that a negro man Jerry, belonging to said estate, and mentioned in the inventory and appraisement, had been sold by Mrs. Binion before her marriage with defendant, and which complainants alleged had never been accounted for, as well as the hire of some of the other negroes, and the proceeds of the sale of the perishable property, monies, &c., received by defendant, and by his wife before their intermarriage; and that all that had ever been received by complainant was the negroes mentioned in said receipts.

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The case was submitted to the jury, upon the bill and amendments thereto—the answer and amended answer, the testimony of a number of witnesses, and the charge of the Court, who found for the plaintiff fifteen hundred and thirty-eight dollars and ninety-eight cents.

Whereupon, defendant moved for a new trial upon the following grounds:

1st and 2d. Because the verdict was contrary to law and evidence.

3d. Because the Court erred in charging the jury, that the receipts given by Rozar the guardian of complainants, and read in evidence by defendant, were for the negroes mentioned therein, and for nothing else; that it was for the Court to construe the receipts, and the jury were bound by said construction.

4th. Because the Court erred in charging the jury, that if they believed that Mrs. Binion sold Jerry and did not return and account for the price or sums received for him, and that Miller the defendant, did not settle and account for him, they must find for the price or sum received by her, or for such part thereof, as was not accounted for, with interest: That the rule as to interest was to compound every six years at eight per cent., until 1845, then at seven percent, compounded every six years.

5th. Because the Court (when requested by defendant's counsel,) refused to charge the jury, that if they should believe that a settlement of the administration took place between defendant and Rozar, the guardian, that their forbearance to make a demand within the statutory period, is evidence that complainants had been fully paid, or that they acquiesced in the settlement.

After argument upon the motion for a new trial, the Court granted the same, on the ground, that the Court erred in its charge to the jury, as to the rule to be adopted by them in

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computing interest, (as set forth in the 4th ground for a new trial,) and on no other ground.

To which decision, complainants except and assign the same as error.

B. HILL, for plaintiffs in error.

SMITH & POU; and BLANFORD & CRAWFORD, *contra*.

By the Court.—McDONALD, J. delivering the opinion.

There were five distinct grounds on which the defendant in the Court below moved for a new trial. The two first grounds, 1st. that the verdict of the jury was contrary to evidence, and 2d, that it was contrary to law may be put in one, neither of which will it be necessary for this Court to consider further than they may be involved in the other grounds. The Court below granted a new trial, on the single ground, that the charge to the jury on the subject of interest, was contrary to law. The assignment of error is special that, a new trial ought not to have been granted on that ground. For the defendants in error, it is insisted, that if the Court in granting a new trial on that special ground erred, yet if there are other grounds in the motion on which it ought to have been granted, the judgment of the Court below should be affirmed. We will examine the several grounds in the motion with the exception already stated.

[1.] I will first refer to that on which the presiding Judge in the Court below granted a new trial. The Court charged the jury that, if they believed Mrs. Binion sold Jerry and did not return an account for the price or sum received for him, and that the defendant Miller did not settle and account for him, they must find for the price or sum received by her, or for such part thereof as was not accounted for, with interest; that the rule as to interest was to compound every six years at eight per cent. until 1845, then at seven per cent. com-

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pounded every six years. The statute of 1847, Cobb 336, prescribes the rate at which interest shall be computed against executors, administrators and guardians, but the rule thereby established applies to cases in which they are guilty of no misappropriation of the trust fund in their hands, or of conduct which subjects them to the imputation of wrong or fraud. Whether the charge was right, depends on the bill, answer and proofs. The administratrix had charged herself with the negro Jerry, in the appraisement, and was therefore guilty of no fraud or concealment in withholding from the record that evidence of her liability. She charged herself with him. It is true she ought to have charged herself with the price, when he was sold, and to have accounted for that price according to the facts of the case in her return; but if she acted honestly in the matter, and did, in the management of the estate, dispose of the proceeds of the sale, or suffered an inevitable loss of a part of the money arising from the sale, in a manner that the Ordinary ought to have passed the accounts, if they had been regularly and specially presented in his Court, then the defendant ought not to be subject to the harsh rule for computing interest which is applied to cases only in which a trustee departs from special directions under which he holds a trust, as where a will directs the fund to be accumulated, or where the *fund* is mismanaged. But for the mere omission to make a return of honest and upright management, she ought not to be held to such an account. But the *cestui que trust* ought not to be injured by the neglect of a trustee to make regular and explicit returns according to law; and therefore, when, under such circumstances, if the *cestui que trust* calls on his trustee for a settlement, and he refuses to or cannot make a full and fair exhibit of his trust accounts, a Court of Chancery ought, and I apprehend would hold him accountable for costs and expenses of a litigation occasioned and made necessary by his default. If the charge had been given with these qualifications, it would have been right; we think that

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the presiding Judge in reconsidering and overruling his charge, is sustained by our former interpretation of the law.

[2.] I will return now to the third ground taken in the motion for a new trial; that the Court erred in charging the jury that the receipts given by Rozar the guardian of complainants, and read in evidence by defendant, were for the negroes mentioned therein, and for nothing else; that it was for the Court to construe the receipts and the jury were bound by the construction. If the Court did so charge, we think it was error. The terms of the receipts are certainly broad enough to embrace a final settlement of the estate, and it was insisted on the part of the defendant that the entire estate was settled with the guardian, and that on that settlement, the receipts were given. This was disputed by the complainants, and there was therefore an issue between the parties on that subject. There was also conflicting evidence as to the settlement, and the whole subject ought to have been submitted to the jury. There can be no doubt, that the weight of the evidence in regard to the acts of the commissioners is that they were appointed to divide the negroes only, belonging to the estate, and that they did no more than to divide them.

The original answer of the defendant states that the commissioners were appointed to divide the negroes. The record from the Court of Ordinary of Monroe county, shows that the commissioners were sworn and divided the negroes, and shows the share apportioned to each distributee; and it shows, moreover, that they divided nothing more. The answer says further, that the defendant had settled fully with the guardian concerning the estate, but exhibits no proof of it, except what is contained in the receipt for the negroes, and the receipts say that the negroes are in full of the distributive shares of the estate due the wards respectively. It is just such a receipt as would probably have been given, if, as to everything else, accounts were fully balanced between the administrator and the wards, as the administrator con-

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tends it was, after retaining a small balance in his hand due by him to them, for the difference between their lots of negroes, and the lot coming to him in right of his wife. It is susceptible of such construction. I do not say that the jury are so to construe it, but the question is to be submitted to the jury, whether the receipt was for a full and final settlement of the estate between the guardian and ward.

[3.] We do not think that the Court ought to have charged the jury as requested by the defendants counsel, if the request was as stated in the last ground in the motion for a new trial. The settlement to have bound these defendants in error, must have been full and final, without fraud or concealment, or if it was not full and final, and without fraud or concealment, it must have been known by the defendants in error, that it was not full and final, but that the plaintiff in error claimed it to have been full and final, and that they acquiesced in it for the period of the statutory bar after they arrived at the age of twenty-one years; and if the fraud, if any, was known to them, and acquiesced in, for the like period, after they attained majority, they were bound by it. There are facts in the case which ought to be considered also, in determining on the legality of this request, as applicable to them. It was a long time after the alleged settlement took place, that this suit was instituted, and the administrators had not been dismissed from the administration; the answer of plaintiff in error shows that he still holds the title of his intestate for a tract of land drawn by his intestate, which has not been distributed; he answers that he was paid the difference between the value of his lot of negroes and the lots of the other distributees of the estate by retaining a balance which he owed them, while the guardian deposes, that he paid this difference in cash; he puts up a claim, to some extent, for the board, clothing and education of defendants in error, while the answer and exhibits, show that these expenses were paid by the common property of the estate; the answer says in substance, that the produce made,

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over and above the cotton, was not more than sufficient to support the children. I will not go further. But these things show that the request as asked of the Court, ought not to have been given in charge to the jury, without explanations of the legal principles to which these facts and circumstances applied, and which ought to have led to a material qualification of the request. That the Court refused to give that request, as submitted, in charge to the jury, was not a ground for granting a new trial, and there was no error committed in refusing it on that ground.

Judgment affirmed.

ELIAS D. HINES, plaintiff in error, vs. ELIJAH ROSSER, and others, defendants in error.

An affidavit filed under what is usually termed the Pauper Act is not traversable.

In Equity, from Harris county. Decision by Judge WORRILL, at October Term, 1858.

This was a bill filed by Elijah Rosser, and others, against Elias D. Hines, for discovery, account, and distribution.

Upon the trial, the jury found for the complainants \$2,917 56, and the defendant Hines, being dissatisfied with said verdict, entered an appeal, and made affidavit, as required by law, that he was advised and believed that he had a good cause of appeal, and that owing to his poverty, he "is unable to give the security required by law, in cases of appeal." This was at April Term, 1857. The case was continued at October Term, 1857, and at April Term, 1858, by the defend-

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ant. At October Term, 1858, counsel for complainants moved to dismiss the appeal, suggesting that defendant's affidavit, that he was not able from his poverty to give security, was not true, and tendered an issue to prove and verify said allegation. Defendant objected to joining issue on said suggestion, on the ground, that such issue was illegal and unauthorized by law.

The Court overruled defendant's objection, and ordered said issue to be made up. To which decision, defendant excepted.

Said issue being made up, under protest by defendant, he then proposed that the issue be tried by the Court. This the Court refused to do, but ordered the issue to be tried by the petit jury. To which order, defendant excepted.

A jury being thereupon empaneled to try said issue, the same was continued on motion of defendant.

After the trial of said issue was continued, the following order, upon motion by complainant's counsel, was taken and entered on the minutes:

Elijah Rosser, and others, }
 vs. Bill, &c.
Elias D. Hines. }

The complainants having tendered an issue on the truth of the affidavit of defendant, on entering an appeal in this case, and the defendant's counsel having objected to joining in said issue, after hearing argument, it is ordered, that the objections so taken be overruled, and that defendant join in said issue.

To the passing of which order, defendant excepted. And thereupon tenders his bill of exceptions, assigning as error the foregoing rulings, orders and decisions.

INGRAM & RUSSELL, for plaintiff in error.

RAMSEY and DOUGHERTY, *contra*.

Bryan vs. Acee et. al.

By the Court.—McDONALD, J. delivering the opinion.

An affidavit to obtain an appeal under what is usually called the Pauper Act, is not traversible. Men's circumstances are best known to themselves, but the community are aware that often men in possession of large property are embarrassed to an amount more than its value, and yet it might be difficult to adduce proof from all the quarters from which it must come, to establish the fact before a jury. Men in such circumstances cannot give security, if they, as every honest man ought to do, disclose their actual condition to the persons to whom they apply to become their security.

If a party swears falsely to obtain an appeal, he may be indicted for perjury.

Judgment reversed.

Judge BENNING did not preside in this case.

JOHN H. BRYAN, plaintiff in error, vs. ALFRED L. ACEE, TILMAN H. MAHONE and JOSEPH D. BROOKS, defendants in error.

If the Court charge the jury in an action of trespass, that if they should believe, under evidence, that the plaintiffs were entitled to exemplary damages, it was in their discretion to find any amount not exceeding the amount laid in the declaration, it is error, provided the amount laid in the declaration was so great, if found, as to show prejudice or partiality on the part of the jury. Such a charge, in such a case, is calculated to exert an improper influence on the jury, and is wrong in itself.

Trespass, *vi et armis*. Tried before Judge WORRILL, in Talbot Superior Court, September Term, 1858.

Bryan vs. Acee et al.

This was an action of trespass, brought by the defendants in error, as trustees of Jackson Academy, in the county of Talbot, against the plaintiff in error.

The declaration alleged, that the plaintiff in error, on the sixteenth day of January, in the year 1855, broke into the school-house of defendants in error, situated on part of lot of land number 42, in the 23d district of Talbot county, and tore down said school-house, and carried away the materials, and converted them to his own use. Damages were laid at two thousand dollars.

On the trial of the case, plaintiffs in the Court below offered as a witness, *Nathaniel Athen*, who testified that he was formerly the owner of the land on which the house, the subject of this suit, was situated; has known the house for nearly twenty years; it had been used for academical purposes; had heard of a school being made up to be kept in said house, in the year 1855. The last time witness saw the house was in the year 1853; it was then worth one hundred and fifty or two hundred dollars. Sold to defendant, Bryan, the whole of lot of land number 42, in the 23d district of Talbot; gave defendant notice, at the time he sold said lot, that witness had previously made a deed to two acres, on which the school-house was situated, to the trustees of the same; that by said previous deed the two acres belonged to the trustees as long as they continued to use the house for academical purposes; but when they ceased so to use it, the *land* was to revert to witness, but the *house* and *improvements* were to be the property of the trustees. The reason why witness did not except said two acres, in his deed to Bryan, was, that he thought the trustees might, at some future day, cease to use the house for academical purposes, and he was willing that Bryan should then have the reversion.

Plaintiffs then introduced and read in evidence, a deed made on the 15th day of October, 1859, by Nathaniel Athen to R. G. Crittenden, Peter F. Mahone, Samuel Fuller, William T. Holmes, A. L. Acee, Daniel Owen and Nathaniel

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Athen, trustees of Bellvue Academy, conveying the aforesaid two acres of land to the said trustees and their successors in office forever, in fee simple, "except with this condition, that when the said trustees or their successors in office cease to use said bargained premises for academical purposes, then the said premises to revert back to said Athen, or his heirs, &c., except the improvements on said premises."

Plaintiffs then proved by one *Asa Teal*, that defendant took down and carried away the house early in the year 1855, and occupied it as a residence for his family. The patrons of the school were put to some inconvenience by the removal of the house.

James Barr testified, that the house was taken down early in 1855; the school which had been made up was "delayed from going on" for nearly two months; there had been a division of opinion in the neighborhood as to whether the school should be kept in this house or at the Presbyterian Church near it; thinks the church would have been more central; the house when torn down was in a dilapidated condition.

Tilman H. Mahone testified, that a school had been made up to commence the week after the house was taken down; Robert Bryan was an applicant for the school; John W. Dzier was to teach it; the school-house was worth two hundred dollars; the patrons had to wait a month or six weeks for a house in which to hold the school; after which time it was kept in a building attached to the Presbyterian Church; permission to teach in said building was given as soon as it was applied for; some of the patrons wished to move the house that was torn down to a more eligible situation.

Alfred L. Acee testified, that the house when torn down was worth two hundred and fifty dollars.

Defendant then offered and read in evidence, a deed made by Nathaniel Athen to defendant, Bryan, dated 7th January, 1853, and conveying lot of land number 42, in the 23d district of Talbot.

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Defendant then proved by *Staten Fulford*, that he was present when the house was taken down; it was badly decayed; the shingles were rotten; both ends of the house were open, having not more plank in them than would have closed up one end; the sills were decayed, the windows all out, and the floor decayed and broken; the house when taken down was worth seventy-five or one hundred dollars.

Defendant then introduced *William T. Holmes* who testified, that he was present when the house was taken down; thinks it was worth from thirty to one hundred dollars; for ten years before it was taken down, it was used for academic purposes not more than one-third or one-half of the time.

Robert Bryan testified, that when the house was taken down it was not fit to be used as a school-house; no school was kept in it in 1854; it was worth when taken down about one hundred dollars.

Here the testimony closed, and the Court instructed the jury, among other things, that damages were either actual or exemplary, and stated to them the meaning of the terms *actual* and *exemplary* damages. The Court then charged them that, in a case like this, they might find both actual and exemplary damages; that the object of the law, in allowing the jury to give exemplary damages, was to deter those who had violated the law from violating it again; and also, to make their punishment a warning to others. That they should examine the facts, and determine whether the defendant should be made to pay exemplary damages; that if, from the facts, they should believe the plaintiffs were entitled to exemplary damages, then the law left it to their discretion to say what the amount should be, and they could find any amount they thought proper, provided they did not go beyond the amount claimed in the declaration. That they should exercise this discretion, not capriciously, but with prudence and wisdom; that inasmuch as it was admitted that defendant took down the house, they should look to the *quo animo* with which it was done; that if they should believe he knew

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the house was not his own, that it was not conveyed to him in Athen's deed, and that when the trustees ceased to use the land the house was to remain theirs; that if they should further believe defendant tore down the house in a spirit of recklessness, in utter disregard of the rights of plaintiffs, then plaintiffs ought to have exemplary damages. But if they should believe, from the evidence, that the school-house was not defendant's property, that it did not pass to him under Athen's deed, but that he made a mistake and tore it down supposing it was his own property, then they ought not to give exemplary damages.

The jury found a verdict in favor of plaintiffs, for five hundred and sixty-seven dollars damages, with costs of suit.

At the same Term, defendant moved for a new trial, on the following grounds:

- 1st. Because said verdict is contrary to law.
- 2d. Because the damages found by said verdict are excessive.
- 3d. Because said verdict is contrary to evidence.
- 4th. Because the Court erred in the foregoing charge to the jury.

On hearing the motion for a new trial, the Court overruled the same, and defendant excepted.

SMITH & Pou, for plaintiff in error.

BETHUNE; PERRYMAN, *contra*.

By the Court.—McDONALD J. delivering the opinon.

We consider the damages given by the jury, in this case, high, under the evidence; but we do not consider them so excessive as to warrant the inference of partiality, prejudice, or corruption on the part of the jury who rendered the verdict, especially under the charge of the presiding Judge. The damages are laid in the declaration at two thousand dollars. The highest value of the house which had been

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torn down and removed, proven by any witness, was two hundred and fifty dollars; the lowest value from thirty to one hundred dollars. A verdict for two thousand dollars, under the evidence, would, in our judgment, have been excessive, and yet the Court charged the jury that if they should believe the plaintiffs were entitled to exemplary damages, the law left it to their discretion "to say what the amount should be, and they could find any amount they thought proper, provided they did not go beyond the amount claimed in the declaration." We must suppose that this charge of the Court exerted an influence over the mind of the jury, as to the amount of damages, especially when they found a verdict for more than double the value of the property, proven by any witness. Believing that the charge of the Court was wrong, and to the injury of the party, we are bound to grant a new trial. In all other respects, we think the charge was unexceptionable, at least it was so in the opinion of two of the members of the Court.

Judgment reversed.

PAUL J. SEMMES, et al., plaintiffs in error, vs. RANDOLPH L. MOTT, et al., defendants in error.

- [1.] Several creditors of an insolvent corporation may unite in the same bill to charge the stockholders, who were also directors, for fraudulently abstracting the capital stock of the bank; and the bill is not objectionable to the charge of a misjoinder of both complainants and defendants.
- [2.] It is premature to move, at the second Term, to dismiss a bill for want of prosecution, before all the defendants are served, and while a demurrer to the bill is still pending at the instance of those who are served.
- [3.] A complainant at equity who has sued at law upon the same demand, cannot be compelled to elect in which form he will prosecute his rights, until after the defendant has filed his answer.

Semmes et al. vs. Mott et al.

In Equity, in Mucogee Superior Court. Decision by Judge WORRILL, at November Term, 1858.

This was a bill in equity filed by Randolph L. Mott, and others, against Paul J. Semmes, and others.

By consent of parties in open Court, the demurrer filed to the bill, and the motions submitted by defendant, Semmes, were argued and decided together.

The demurrer was filed to said bill by Paul J. Semmes, on the grounds:

1st. That there was no equity in the bill.

2d. That there was a misjoinder of complainants.

3d. That there was a misjoinder of defendants—which demurrer was filed at the return Term of said bill, and a notice thereof given to complainants, and is a part of the record. The Court overruled the demurrer on all the grounds therein mentioned, and to this ruling and judgment of the Court, Paul J. Semmes excepted, and now assigns the same as error.

The first motion was one made by said Semmes, to dismiss the bill of complainants for want of prosecution; and in connection with this motion it was shown that the bill was returned to the May Term, 1858, of said Court, and Semmes and B. A. Thornton were served, and that no steps had been taken to serve the bank, or the other two defendants; no notice having been given complainants, except a verbal notice. The Court overruled this motion, and to this ruling and judgment said Semmes then and there excepted, and now assigns the same for error.

The next motion was made by Semmes, to compel the Columbus Omnibus Company, and R. L. Mott, the complainants to said bill, to elect whether they would proceed at law or equity; and in connection with this motion, it was shown that these two complainants had actions pending in said Court at law, by process of garnishment against Semmes, for the same claim or demand which the bill seeks to recover. The Court also overruled this motion, to which ruling and

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judgment of the Court, said Semmes then and there excepted, and now assigns the same for error.

JOHNSON & SLOAN, for plaintiffs in error.

Wm. DOUGHERTY, *contra.*

By the Court.—LUMPKIN J. delivering the opinion.

[1.] As to the misjoinder of both complainants and defendants in this case, which is an objection to parties, we hardly think the exception well taken. A decree can be so framed as to protect the rights of all concerned. Suppose the demand of one complainant be \$2,000, of another \$1,000, and of a third \$500, and one of the defendants be held liable for \$2,000, another \$1,000, and the third \$500; the decree can be so moulded as that each complainant shall recover his proportionate part of these several sums. To sue jointly, and defend jointly, is the best for all concerned, where it can be done. We see no insurmountable obstacle in this case.

[2.] The bill in this case was filed to the May Term of the Court, 1858. Some of the defendants resided out of the State; and all the parties had not been served at the November Term ensuing, when these several motions were made. All the defendants are proper parties. They are not all necessary or indispensable parties. Those that were served filed a demurrer, which was then pending and undisposed of. A motion to dismiss the bill for want of prosecution, under these circumstances, was obviously premature. It is true that, under Mr. Stubbs' bill of 1857, to regulate proceedings in equity causes, more diligence is required to speed suits in chancery. That measure took effect in April, 1858, and consequently, this case falls within it; still it contains no provision which would justify this application.

It is insisted that an application of this sort must always be preceded by a motion to show cause. But we apprehend the motion itself is in the nature of a *rule nisi*. And of

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course the opposite party must be allowed an opportunity to show cause before a judgment is rendered.

[3.] A third motion was made in this cause, to compel two of the complainants, who were proceeding at law, to enforce the same claims, to elect in which form they would prosecute their rights.

The English rule is never to compel an election until the answer of the defendant is filed. It may be replied, that the defendant can be made to answer here at law; and therefore, the reason for this chancery rule no longer exists. And this is true. Still we are not prepared to hold that this necessarily abrogates the old practice. Under Mr. Stubbs' bill, (*Pamphlet Acts*, 1857, p. 106,) the complainant may compel the defendant to testify on the stand, notwithstanding he has filed his answer. In other words, he is entitled to both examinations.

The converse of the proposition should hold, namely: that to be examined orally, as a witness at law, does not necessarily dispense with an answer in equity, to procure which, to be used as evidence at law, is the reason for the rule requiring the answer in equity to be filed before the complainant will be put upon his election.

As to the want of equity in the bill, my brother BENNING and myself cannot concur in rendering a judgment. And our colleague not presiding in the case, on account of sickness, we have directed the Clerk to certify this fact to the Circuit Court.

Judge McDONALD, on account of illness, did not preside in this case.

Russell vs. Kearney.

[27] 96
110 867

[27] 96
129 281

BENJ. T. RUSSELL, plaintiff in error, vs. ELIZABETH A. KEARNEY, defendant in error.

- [1.] The acts of Congress of 1790, and 1804, providing for the admissibility of exemplifications of records, &c., do not extend to the case of exemplification of the record of a private writing recorded under a registry law.
- [2.] A party has no right to complain that evidence, is admitted after the close of the evidence, unless he is less prepared to meet it when admitted, than he would have been had it been admitted at the proper stage of the trial.
- [3.] That an estate is given to A. for life, or years, and, to B. in remainder, does not make A. the trustee of B. as to B's remainder.
- [4.] In trover by one having a partial interest in the chattel converted, he can recover only an equivalent for his interest.
- [5.] The doctrine, that a voluntary conveyance must yield to a subsequent conveyance founded on valuable consideration, applies only where, both conveyances are made by the same person.
- [6.] If the Will requires the executor to divide the negroes of the estate, into shares, and to give the shares to the legatees, and he gives a negro to a legatee without such a division, and the legatee sells the negro, the fact that the executor omitted the division, is a matter that may affect the executor as between him and the other legatees, unless they have acquiesced for a long time, in the executor's course, but it is not a matter which can affect the person who purchases the negro from the legatee.

Trover, in Houston Superior Court. Motion for new trial.
Decided by Judge Lamar, at June adjourned Term, 1858.

This was an action of trover, brought by Mrs. Elizabeth A. Kearney, widow of the late Richard B. Kearney, deceased, against Benjamin T. Russell, for the recovery of a negro man slave, John.

Plaintiff claimed said slave under the last will and testament of Mrs. Sally Thrift, deceased, late of Warren county, North Carolina, the mother of her deceased husband.

The said will of Mrs. Thrift, directed that all her just debts be paid and then disposed of the balance of her estate as follows: all of her negroes to be divided into three equal parts. One of said shares to be allotted to her son Jno. T. Kearney, to be held by him during his natural life, and after his death she gives said share to his wife, should she survive

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him, during her life or widowhood, and after the death of the said John T. Kearney and his wife, or after the termination of the widowhood of the wife of said John T., then she gives said share to his children equally to be divided between them. Another of said shares she gives to her son *Richard B. Kearney*, to be held by him during his life and after his death to his widow and after her death or widowhood, to his children, in the same manner as bequeathed to her son John T. above stated.

At the time this will was executed by Mrs. Thrift, she was a *feme covert*, but she made the same under and by virtue of the powers conferred upon and vested in her, by a marriage settlement executed between said Sally, then Kearney, widow of Jas. Kearney, deceased, of the county of Warren, North Carolina, of the first part, and Wm. C. Clanton, trustee, of the second part, and William Thrift, the intended husband, of the third part. Settlement entered into and executed before and in contemplation of the marriage of said Sally and William, dated 3d May, 1820, registered 12th May, 1820. The will of Mrs. Thrift bears date 20th July, 1847, and admitted to probate at August Court of the same year (1847.)

Defendant pleaded the general issue. The case was submitted to the jury who upon the evidence of both parties, argument of counsel and charge of the Court, returned a verdict in favor of the plaintiff for twelve hundred dollars damages, which may be discharged by the delivery of the negro John, sued for, within thirty days, and the further sum of four hundred and eighty dollars for hire, with costs of suit.

Whereupon defendant's counsel moved for a new trial, upon the following grounds:

- 1st. Because the verdict is contrary to law.
- 2d. Because the verdict is contrary to law and evidence.

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3d. Because the verdict is against the evidence and the weight of evidence.

4th. Because the Court erred in admitting in evidence the exemplified copy of the marriage settlement between Sally Kearney, Wm. C. Clanton and William Thrift; said marriage settlement not having been recorded in this State, nor its execution proved by the subscribing witnesses: The certificate by the officer of its having been recorded there, not being sufficient to admit said settlement in evidence here.

5th. That the Court erred in allowing plaintiff to introduce said marriage settlement in evidence, after the testimony was closed on both sides and counsel for defendant was addressing the jury.

6th. That the Court refused to charge the jury as requested by defendant's counsel, "that Richard B. Kearney, the husband of plaintiff, under whom defendant holds the negro in controversy, stood in the relation of trustee for this property, and if defendant bought from him without notice, he obtained a good title, and if plaintiff does not prove notice to defendant before he purchased from plaintiff's husband, then they must find for the defendant;" but charged the contrary thereof.

7th. That the Court erred in refusing to charge as requested by defendant's counsel, "that the plaintiff, if entitled to anything, is only entitled to an estate for life or widowhood in said negro, and to enable her to recover she should prove the value of this estate or interest for her life or widowhood, and they cannot conjecture the value thereof, from the proof offered of his fee simple value."

8th. "*That the Court charged the jury as requested by the defendant's counsel in writing, that if the plaintiff has not identified by her proof the negro sued for, and that he is now in possession of defendant, or was when suit was commenced, as being one of the negroes conveyed, or the natural increase of one of the negroes conveyed, in the will and marriage settlement introduced by plaintiff, the jury must find for the defendant; and instead thereof, charging the jury that the*

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evidence in the case did prove the identity of the negro conveyed in the deed of trust and will."

"The Court charged the 8th request, but at the same time charged the jury that they must look to all the case and see whether or not the property was identified."

9th. That the Court erred in refusing to charge as requested by defendant's counsel, that the will introduced by plaintiff in support of her title, is a voluntary conveyance, and if she fail to prove notice to defendant, then the jury must find for him.

10th. The same as 7th ground.

11th. That the Court erred in refusing to charge as requested by defendant, "that an innocent purchaser for valuable consideration is entitled to hold against those claiming under a voluntary conveyance." And in refusing to charge—

12th. That unless the evidence shows the negroes bequeathed by Mrs. Thrift's will, had been divided as therein directed, then plaintiff cannot recover, for the executor could not give off the negro sued for to plaintiff or her husband without such division.

The Court, after argument, refused the motion for a new trial, and counsel for defendant excepted.

WARREN & HUMPHRIES, for plaintiff in error.

WHITTLE & POWERS, *contra*.

By the Court.—BENNING J. delivering the opinion.

Ought the Court below to have overruled the motion for a new trial?

That is the question.

We think not. We think, that some of the grounds of the motion, were good—To the consideration of the grounds of it, I now proceed.

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The first three of the grounds, may be passed without remark.

The fourth ground was, we think, good.

[1.] The general rule is, that the production of the original writing must be required, until an excuse has been given for its non-production. No excuse was given for the non-production of the original marriage settlement. The exemplification of the record of that settlement, was admitted to the jury, on the idea probably, that the admission, was sanctioned by the act of Congress, of May the 26th, 1790, or by that of March the 27th, 1804. But in our opinion, neither of those acts extend to the case of the exemplification of the record of a private writing, such as a deed. Such a writing, after being recorded, leaves the office of record and returns to the hands of the private owner. It is still as much an original as ever, and must, therefore, be better evidence of itself, than a copy of the record of it, can be. *See Acts, Pr. Dig., 221.*

[2] We cannot see any merit, in the fifth ground—The admission of the marriage settlement to the jury, though recurring at a late stage of the case, seems not to have prejudiced the plaintiff, at all. He did not say, that he was surprised at the introduction of the evidence, or, that he was at all less prepared to meet it, than he would have been, had it been introduced at an earlier stage of the case.

[3.] Nor is there any merit, in the sixth ground—That an estate is given to A., for life, or years, and, to B., in remainder does not make A., trustee of B., in respect to B's remainder—The fact that B., happens to be the wife of A., can make no difference. But this ground was not seriously insisted on.

[4.] There is merit, we think, in the seventh ground—Mrs. Kearney had but an interest for her life, or widowhood, in the negro. She did not represent any other interest—she was not trustee, guardian, or agent, for those entitled to the remainder. What right then had she, to recover anything more than an equivalent for the interest belonging to herself?

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None that we can see, and with us, on this point, seem to be the authorities. *Mayne on Dam.*, 213, and cases cited.

There is difficulty in understanding the eighth ground. We rather think, however, that this, at least, is to be gathered from it—that the Court told the jury, that the evidence proved the identity of the negro involved in the suit. Such a statement to the jury, was contrary to the Act of 1850. *Cobb* 462.

[5.] There is nothing, we think, in the ninth ground. The doctrine, that a voluntary conveyance is not good against a subsequent conveyance founded on a valuable consideration, has place only where both conveyances are made by the same person. This is too obviously true, to need support.

The tenth ground is the same as the seventh.

The eleventh ground is the same as the ninth.

As to the twelfth and last ground: it is true that the will required the executor to *divide* the negroes and give to each legatee, his share of them. But, in the first place, the executor, who was examined as a witness, says, that the legatee having the first estate in the negro in question, received the negro of him, "as the executor of Sally Thrift, and under the provisions and conditions of the will;" and if this be true, then, the negro was received by the legatee after the executor had made a division such as the will required. But, secondly, if this was not enough—and it be true, that there was really no division, yet that is not a matter of which, Russell could complain, although it may be one of which the other legatees might. In such a case, the neglect of the executor, might make him liable to the other legatees for a *devastavit*. And, thirdly, even they cannot complain, if they have acquiesced in the executor's course—supposing that illegal. And, it is to be presumed, that they have—for, as far as appears, they have not complained of the manner in which this negro was turned over by the executor to Rich-

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ard Kearney, and that turning over happened some ten or eleven years ago.

Moreover, Russell, himself, claims under this very act of the executor. He bought from the legatee, to whom the executor delivered the negro; and that legatee received the negro for himself, and for the remaindermen after him. He would be estopped to say, that he did not so receive the negro. And Russell, being his assignee, must stand in his shoes—especially as he had notice of the remainder estate, when he purchased.

So nothing in this ground.

Judgment affirmed.

[27] 102
130 531

JAMES W. BROWN, guardian, plaintiff in error, vs. CATHERINE
WESTBROOK, defendant in error.

- [1.] Mental incapacity, at the time of marriage, a ground for divorce in this State.
- [2.] A libel to dissolve the marriage union, on that account, is to be filed and tried, and is subject to all the incidents regulating divorces, by the statutes of force on that subject.
- [3.] A proceeding to declare marriage a nullity, on account of the mental incapacity of one of the parties to consent to the contract, at the time it was entered into, is unknown to our judiciary system, and is repugnant to the feelings and policy of our people.

Divorce, in Houston Superior Court. Tried before Judge LAMAR, at October Term, 1858.

This was a libel for divorce, at the suit of John W. Brown, as the guardian of Richard N. Westbrook, a lunatic, against Catherine Westbrook, the wife of said Richard N.

The alleged ground of divorce was the lunacy and insan-

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ity of Richard N. Westbrook, at the time of his marriage with said Catherine, in the year 1848.

The libel further stated that, under proceedings had in the Court of Ordinary for said county, the said Richard N. was, on the 21st day of May, 1849, duly found and declared a lunatic, and the said John W. Brown appointed his guardian.

The respondent, Catherine Westbrook, the wife of the said lunatic, answered, that said Richard N. was of sound mind, and capable of contracting marriage, at the time of her intermarriage with him; that upon the facts, as stated in plaintiff's petition, a divorce should not be granted; and that he has filed no schedule of the property owned by the parties, at the time of filing the libel, as required by statute. The respondent further answered and pleaded, that the plaintiff, as guardian, was not entitled, in law, to institute proceedings for a divorce.

A special jury, at a former Term, had found a verdict in favor of a total divorce.

Upon the trial before the second jury, the plaintiff having closed his testimony, counsel for the defendant objected, that no schedule of the property of the said Richard N. Westbrook had been filed, as required by law. The Court sustained the objection, and ordered a schedule to be filed. To which counsel for plaintiff excepted.

The property owned by said lunatic, in the hands of his guardian, as per said schedule, amounted in value, over and above his debts, to \$39,642 50.

The evidence on both sides being closed, the presiding Judge charged the jury, "that although they might find for the plaintiff, and grant a total divorce, on account of Richard N. Westbrook having been of unsound mind at the time of the marriage, yet they had the power to dispose of the property in such a way as to give to defendant a part thereof, if they saw proper so to do; that they were not bound to give a part to her, but it was discretionary with them to do so."

The presiding Judge further charged, that the child of de-

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fendant by said Richard N., was entitled to participate in his property equally with his children by a former marriage, and that they must frame their verdict accordingly. To which charges counsel for plaintiff excepted.

The jury rendered the following verdict, viz:

"We the jury find that sufficient proofs have been adduced to our consideration to authorize a total divorce; that is to say, a divorce *a vinculo matrimonii* between the parties, Richard N. Westbrook, and Catherine Westbrook, his wife, upon legal principles. And we also find and decree that property to the amount of **TEN THOUSAND DOLLARS** be left in the hands of the guardian of the said Richard N. Westbrook, for his support, and at his death to go to and be equally divided between the children of the said Richard N. Westbrook, by his first wife, and the child of the said Richard N. and Catherine, by the last marriage, (the marriage hereby declared void,) share and share alike. And we further find and decree that property of the estate of the said Richard N. Westbrook be turned over by his guardian, to a trustee to be appointed for that purpose, to the amount or value of **FOUR THOUSAND DOLLARS**, the annual proceeds or interest of which only is to be applied to the support and maintenance of the said Catherine during her life; and at her death, said four thousand dollars to be equally divided between the children of the said Richard N., by his first wife, and the child by the said Catherine, his last wife. The rest of the property of the said Richard N. Westbrook, now in the hands of the said guardian, be divided between the children of the said Richard N., by his first wife, and the child by his last wife, Catherine, as above specified, share and share alike; provided all just debts of the said Richard N. Westbrook are first paid."

Plaintiff objected to that part of the verdict disposing of the property of Richard N. Westbrook, and especially to that part allowing the said Catherine, and her child by the said Richard N., any part of said property. The objections were overruled by the Court, and the verdict ordered to be recorded.

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Afterwards plaintiff's counsel moved to set aside that part of the verdict above objected to. The Court refused the motion, and plaintiff excepted.

SAM. HALL; JNO. M. GILES, for plaintiff in error.

SAM. D. KILLEN, *contra*.

By the Court.—LUMPKIN J. delivering the opinion.

This was a libel for divorce, brought by Brown, as guardian of Westbrook, against Catherine, his wife, on the ground of *mental incapacity* at the time of the marriage. The plaintiff failing to file a schedule, the Court, on motion, compelled him to do so. And the special jury found, that sufficient proofs had been submitted to them to grant a total divorce between the parties. They further found, that \$10,000 be set apart for the support of the lunatic during his lifetime, \$4,000 for the maintenance of the wife, and the residue of the property, including the remainder of these two funds, be equally divided amongst the children of the lunatic by a former wife, and the child of the present marriage.

It is insisted by the plaintiff below, and the plaintiff in this Court, that so much of the verdict shall stand as separates the parties; and he proposes to arrest and vacate that part of it which makes provision for the wife and the offspring of the second marriage. The position assumed is, that this marriage was not voidable only, but void for want of capacity in the husband to consent to the contract. And that consequently, the marriage being meretricious, the parties have been living together in a state of concubinage, and not of wedlock, and that the offspring of this unlawful connexion is a bastard.

This is a grave question; one of much magnitude, not only to the parties immediately concerned, but to society. Whether such a marriage be void, or voidable only, before a commission of lunacy issue, and office found, I shall not stop

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to inquire. The old authorities, and perhaps the weight of authority, previous to the Act of George II., are in favor of the latter proposition. But with my view of this case, it is unnecessary to worry myself or others, as to what was or was not the transatlantic law, ancient or modern, or the law of any other State, upon this subject.

[1.] Nowhere else is mental incapacity, except in Georgia, so far as I know, made a ground for *divorce*. Elsewhere, proceedings are instituted in chancery, or some other Court, to annul the pretended marriage. A sentence of *nullity* is rendered. Now, I maintain broadly, that in this State no decree can be rendered, separating man and wife, where there has been a marriage *de facto*, except under our Divorce Laws. That they have virtually repealed the whole body of the English Ecclesiastical and Common Law, upon this subject. Was any such proceeding ever known or heard of in Georgia, to obtain a sentence of *nullity*? The recollection of the bar, and the records of the Courts, furnish no such precedent. On the contrary, separations between those who are husband and wife *de facto*, have only been effected by the Act of the Legislature, or of the Courts, or by the joint action of both; and that, too, in a proceeding both in form and substance, *for a Divorce*.

It may be said that the power may exist, although it has lain dormant since the beginning of our history, liable to be called at any time into action. The failure to exercise this power, is strong evidence that it never was recognized and adopted by our people; and our statutes show that it is distasteful to their feelings and sense of right. I should be reluctant myself to give vitality to any great principle of the law, which had slept for three-quarters of a century.

The whole tenor of our legislation favors the view which I have taken of this subject; and it is right that it should. No innocent woman should be separated from the man whom she supposed to be her husband, without being provided for; and the idea of bastardizing the children of such a marriage,

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is monstrous. And that is just what the plaintiff in error is seeking to have done in this case. If the woman has been guilty of a fraud and circumvention, turn her away penniless, if you please, as a punishment for her misconduct. The divorce jury have the power to do this. But the guiltless progeny—never! The special jury have exercised their power in this case, as they generally do, wisely and well. The commission of lunacy never issued until after the marriage; and no trick or artifice is attributed to the wife, in procuring this marriage. It is said the husband was rich and she was poor, and that misalliances of this sort rarely occur under any other circumstances. Do mercenary matches never take place, in this our day and generation, except amongst the insane? Such a conclusion, I regret to say, would almost stultify our race. Love matches! They exist only in the creation of novelists. They are rarely known in actual life.

[2.] But suppose I am wrong in all this. Here, the plaintiff, instead of instituting a proceeding to declare the marriage a nullity, has seen fit to sue out an old fashioned libel for divorce. The jury were sworn, proofs offered, and a verdict rendered under our divorce laws. And the proposition is, to hold on to his half of it, and repudiate the residue! This will not do. It may be that there are cases where a verdict and judgment might be separated; where one part is not the consideration for the other. But the jury, in this case, might never have agreed to dissolve this union, without making adequate provision for the wife and child. And to let one part stand, and not the other, might be to defeat the finding of the jury. I doubt not it would. But for the verdict, as a whole, it never would have been rendered. We have not the evidence in the record. And it might be inferred, that it was restricted to the issue made in the pleadings. But it is stated by counsel, that the certificate of the Superintendent of the Asylum was read, giving it as his opinion that the insanity of Westbrook was permanent and

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incurable. How natural was it for the jury to overlook the real issue, to-wit: his mental capacity at the time of the marriage, and conclude that inasmuch as the parties were divorced in fact, and that for life, that it was best for all concerned to declare them so in law; and fix the status of the parties, as well as the division of the property, so that it might be managed with safety by the guardian, and beneficially for the lunatic and his family. And this I maintain they had a right to do.

I care not to what forum the lunatic, by his guardian, appeals; nor what form of proceeding he adopts; a jury in Georgia will never be found who will pronounce a woman, whose conduct is unimpeached, a fornicatress, and her babe a bastard. And yet this result is inevitable under a sentence of nullity. Neither will they drive her and her child, like Hagar and Ishmael, with only a morsel of bread and a bottle of water, to starve in the wilderness, while the husband and the father have a plenty and to spare. Should any such be thus unfeelingly expelled from the hearth and homestead, which they supposed to be their own, may they receive that comfort and support from Heaven, which were vouchsafed to the Egyptian handmaid of old, although denied to them by man!

What shall we do then? Declare this whole proceeding a nullity? We are not asked to do this; but to reverse the judgment of the Court below for refusing to vacate a part of it. For myself, I believe the proceeding legal and the verdict just and binding; and vote for affirming it *in toto*. I should not represent the genius and gallantry of the men of Georgia, standing out so prominently in all our laws, were I to do otherwise.

This Court had, by one of its decisions, limited divorces to the legal grounds existing at common law. The Legislature, in 1850, passed an Act specifying the causes upon which divorces from the bonds of matrimony should be granted. And the second ground enumerated is, *mental in-*

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capacity at the time of marriage. Cobb, 226. It is manifest, therefore, that the General Assembly supposed that mental incapacity at the time of marriage, was a ground for *divorce*, and not for a sentence of *nullity*. So have thought the bar and bench since the organization of our State judiciary. So thought the counsel in the case; else why file this libel in the Superior Court?

It is said that a sentence of nullity does not bastardize the issue. That is, the sentence does not say so, *in form*. But this is sticking in the bark. When that is the necessary and inevitable effect, it is not pretended but that it will follow, as a matter of course, in this case.

It is said that North Carolina, and some of the other States perhaps, have divorce laws, and yet entertain proceedings to annul marriages. Their divorce laws, as well as the spirit of their people and institutions, are different from ours. Their policy may be different. Our Legislature has done its utmost to save innocent children from the brand of illegitimacy. By the 7th section of the Act of 1806, (*Cobb, 225,*) it is provided that in *all cases* of divorce, the issue of the marriage shall not be bastardized; but shall be capable of taking by descent or distribution from either of their parents. And with this sweeping declaration they felt content; believing as they did, that the marriage relation could not be annulled, except by divorce. But to demonstrate still further their settled and determined policy, upon this subject, it is enacted, (*Cobb, 814,*) that even in cases of bigamy, the offspring shall not be spurious, if born before prosecution, or within the ordinary period of gestation afterwards. Where there is a husband or wife living when the second marriage is formed, the suffering party does not always seek a divorce. Hence the propriety of this provision. If they did, the children would be protected under the 7th section of the Act of 1806.

It may be said that this clause in the code shows, that without it the offspring would have been bastards. Hence it may be argued, that in case of mental incapacity to marry,

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the same consequences must follow. Not so, according to my doctrine. Marriage can only be dissolved, for this cause, by divorce; and then the statute intervenes to save the offspring. Without sentence of nullity or divorce, who would run the risk of forming a second marriage, on account of want of capacity to contract the first? A fact to be decided upon the evidence of witnesses and the opinion, a jury might entertain of the testimony. Bonds thus entered into should be binding until formally and legally dissolved. Such is and ever has been the understanding of the country, and of all departments of the government.

Judgment affirmed.

McDONALD J. concurred.

BENNING, J. dissenting.

The question is, was the Court below right in holding, that the jury might make provision for the defendant and her child out of the property of the plaintiff, Westbrook?

Such provision the law admits of, only in divorce cases. Therefore, if this was not a divorce case, the Court must have been wrong.

Was this a divorce case? A divorce case is a case in which, the plaintiff states a marriage between himself, or herself, and the defendant, and prays that for some alleged cause, he or she may be divorced from the defendant. The declaration must state a marriage, for where there is no marriage, there can be no divorce. Divorce is the partial or total separation—*unmarrying*—of married persons, and there can be no separation, if there has been no union—no unmarrying, if there has been no marrying. The declaration, then, must state a marriage: if it states that there was no marriage, it is impossible, that the case can be a divorce case.

Does the declaration in this case fail to state a marriage—

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does it rather state what shows, that there was no marriage? It does. It states, that at the time when, what it assumes as a marriage, was entered into, one of the parties, the plaintiff in this case was a lunatic. And a lunatic is incapable of entering into marriage, for marriage is a contract, and a lunatic is incapable of entering into a contract. Suppose the declaration had stated, that, at the time of the assumed marriage, one of the parties was an infant not over five years old; or was a slave; or was a person with a living husband or wife; would it not have stated what would show, that there was no marriage? Most certainly it would, and why, because an infant five years old; a slave; a person with a living wife or husband; is incompetent to enter into marriage. A lunatic is just as incompetent. It is true, then, that the declaration states what shows it to have been impossible, that there could have been a marriage. The case, then, made by the declaration, is, in law, precisely what it would have been, had the statement in the declaration been, that there had never been any marriage at all, between the parties. And such a case as that, I think I may assume, is not a divorce case.

Did ever any person hear of a divorce case between a free person and a slave—or between parties one or both of whom was a bigamist? And why not? Because, marriage cannot exist between such persons. It is equally true, that marriage cannot exist between persons, one of whom, is an idiot or a lunatic.

It is true, that the divorce Act of 1850, has,—“mental incapacity at the time of marriage”—as one of its grounds of divorce; but is that equivalent to saying that idiots, lunatics, and infants five years old, are competent to enter into marriage? By no means. Suppose an Act to say, that one ground of avoiding contracts should be mental incapacity at the time of the contract—would any body maintain, that the Act impliedly said, that slaves, idiots, lunatics and children under seven, were competent to make contracts? Nobody, I

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think, could seriously maintain, that the doctrine of legislation by implication, should be carried these lengths—the truth is, that expressions of this sort, are the result of mere inadvertence. If there is “mental incapacity” to enter into marriage, marriage is never entered into; and if marriage is never entered into, to talk of divorce, is to talk of death, when there has never been any life. This any one sees when his attention is called to it.

These things being so, this case in my opinion is not a divorce case;—and, consequently, is not a case to admit of the decision of the Court below.

True, such an opinion as this of mine, might “bastardize the issue,” as the expression is, and leave it and the mother, without provision, from the father. But what is the evil of these things, as compared with the evil of holding, that all persons laboring under “mental incapacity” to marry, may yet marry and (by consequence) make any other contract—that idiots, lunatics, infants old enough to say yes, slaves even, may marry or make any other contract. In truth, though there may, in these cases, be cause for sympathy with the issue, there can hardly ever be any cause for sympathy with the parent. The fact will be, that in nine of the cases out of every ten, the parent was a fortune hunter, and acted with open eyes. Marriage will never invade the idiot or the lunatic, who is without fortune.

But, if this is not a case for a divorce, what is it a case for? I answer, it is a case for a sentence of *nullity* of marriage. Such cases are of frequent occurrence in the English Ecclesiastical Courts. There is never any absolute necessity for such a sentence, yet such a sentence is in many cases, valuable, and is more desirable on several accounts. The Divorce Acts do not provide for a suit to attain such a sentence.

Does it thence follow, that no way exists by which such a sentence may be attained? I am not prepared to say so. The Act of 1820, giving equity jurisdiction, says, that “the

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Superior Courts" "shall exercise the powers of a Court of Equity, in all cases where a common law remedy is not adequate." The cases under consideration, are cases in which, there is no remedy at all at common law, why then are they not cases provided for, by this Act? I do not see why.

For these reasons I dissent from the judgment of the Court.

27	113
104	247
27	113
1113	849
27	113
1127	318

MACON AND WESTERN RAILROAD COMPANY, plaintiff in error, vs. JAMES M. DAVIS, defendant in error.

- [1.] If there be a joint administration, and only one administrator sue, the non-joinder of the other can only be taken advantage of by plea in abatement, and that being a dilatory plea, the truth of it must be sworn to. If the administrator, not joined, be a *feme*, and she marry during the pendency of the action, it is not necessary to amend the declaration at the trial, by adding her as a party, or to prove that, on her marriage, her letters of administration were revoked, and to pass an order for the suit to proceed in the name of the administrator who alone sued; but if this be done, it does not vitiate the proceedings.
- [2.] Declarations of a person who is not a party, nor the agent of a party to a transaction, and who is a competent witness, not made *at the time* of the act of which it is insisted it is explanatory, are not admissible in evidence as part of the *res gesta*.
- [3.] In suits against a Railroad Company, if it appear that there was mutual faults, the party guilty of the greater wrong or negligence, must be regarded as an original aggressor.
- [4.] Whether the verdict of the jury was contrary to evidence, without evidence and against the weight of evidence, considered and determined.

Case, in Bibb Superior Court. Tried before Judge LAMAR, at November Term, 1858.

This was an action by James M. Davis, as administrator of Willis Boon, deceased, against the Macon and Western

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Railroad Company, to recover the value of a negro man slave and a carriage. The slave killed, and the carriage destroyed by the cars, running on defendant's railroad.

All the facts necessary to a full understanding of the points adjudicated, are stated in the opinion of the Court.

By the Court.—McDONALD, J. delivering the opinion.

James M. Davis, as administrator on the estate of Willis Boon, deceased, instituted an action in the Superior Court of Bibb county, against the plaintiff in error, for the recovery of damages, for the destruction of a rockaway carriage, and killing a negro man slave, the property of his intestate, by the conducting and running the engine and cars of said plaintiff in error, forcibly and illegally against and upon and over the said carriage and slave.

On the trial of the cause, the jury rendered a verdict in favor of the defendant in error, whereupon the plaintiff in error, who was defendant in the Court below, moved for a new trial on several grounds, to-wit:

1st. Because the verdict of the jury is contrary to evidence, and without evidence to sustain it.

2d. Because the verdict of the jury is decidedly and strongly against the weight of the evidence.

3d. Because the verdict of the jury is against the law in said case and against the justice of the case.

4th. Because the Court erred in admitting in evidence, the letters of administration of the plaintiff, and also in admitting in evidence the order or judgment of the Court of Ordinary of Crawford county, and also in allowing the plaintiff to amend his declaration, by inserting the name of Henrietta A. Boon as co-plaintiff, and the passing an order that the case proceed in the name of James M. Davis alone.

5th. Because the Court erred in ruling out any of the evi-

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dence of Dr. D. B. Searcy, all being ruled out except the seventh interrogatory.

6th. Because the Court erred in allowing the plaintiff to introduce in evidence and prove the injury done to other persons than the negro June, and because the Court erred in not ruling out all the answers in the interrogatories of Mrs. Winn and Mr. Snow, and other witnesses, proving the injury to Mrs. Winn and her children.

7th. Because the Court erred in its charge to the jury.

The presiding Judge in the Court below, on hearing argument on this motion, refused the new trial, and counsel for the defendant excepted to his judgment thereon, and assigns for error:

1st. That the Court admitted in evidence on the trial, the letters of administration of James M. Davis and Henrietta A. Boon, upon the estate of Willis Boon, deceased, together with the order or judgment of the Ordinary of Crawford county, discharging Henrietta A. Boon from the administration.

2d. In admitting evidence upon motion of the plaintiff, on the trial, of injuries done to other persons, than the slave June, to-wit: injuries done to Mrs. Winn and her children.

3d. In ruling out the testimony of Dr. Daniel Searcy, proving the statements and sayings of Mrs. Winn, taken by commission.

4th. In overruling the motion of counsel for the defendant for a new trial on each and all the grounds taken in their motion for a new trial.

This Court, at the last June Term, at this place, decided the point made in the second assignment of error, and held the identical evidence admissible in the case of *Malinda Winn vs. The Macon and Western Railroad Company*. We consider the decision in that case, as decisive of this point, and without further remark, I will pass on.

[1.] The first assignment of error, is predicated on the

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judgment of the Court below, overruling objections made, to the admission in evidence of the letters of administration granted to the plaintiff and Henrietta A. Boon, on the estate of Willis A. Boon, deceased, and the order of the Court of Ordinary of Crawford county. The action was instituted originally by Davis, as administrator of Willis Boon, for the recovery of damages for the destruction of property belonging to his intestate. On the trial of the cause, he tendered in evidence the said letters of administration, and an order passed by the Ordinary of Crawford county, reciting that Henrietta A. Boon had intermarried with Adolphus A. Purifoy, who had failed to apply for letters and revoking her letters, and discharging her from liability as administratrix. When this evidence was demurred to, the plaintiff's counsel moved that his declaration be amended by inserting the name of Henrietta A. Boon as administratrix, jointly with the said James M. Davis, as original plaintiff, so as to perfect the record. To this amendment the counsel for the defendant objected, which objection was overruled by the Court and the defendant excepted. The plaintiff's counsel then moved that the cause proceed in the name of James M. Davis alone, as administrator, to which the defendants' counsel objected. The Court overruled the objection and the defendants excepted.

The whole of this proceeding, amending the declaration, by adding Henrietta A. Boon as a party plaintiff; the order of the Ordinary of Crawford county revoking her letters of administration, and the order of the Court below, directing the cause to proceed in the name of James M. Davis alone, as administrator, was useless. If it affected the case in the slightest degree, we might, perhaps, consider, whether it was strictly regular and legal, to have *added* a party plaintiff to the case by way of amendment. We do not say that it would not be allowable under our very liberal statute of amendments, when it would prevent an injustice, or save costs. We are inclined to think that the Ordinary of Crawford

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county made a very liberal use of his power, and perhaps exceeded his authority, when he revoked the letters of administration of Henrietta Boon, and discharged her from liability as administratrix, on account of her marriage. Her letters abated by reason of her marriage, *during coverture*. They abated by act of the law and not by the act of the Ordinary, and no action by him was necessary to give effect to the abatement. I apprehend, that by the death of her husband, during her life time, her letters of administration would be revived. If the suit had been originally instituted in the joint names of herself and Davis, as administrators, nothing more was necessary, to enable Davis, as administrator, to prosecute the suit in his own name as administrator, than to have suggested of record her marriage, and the consequent abatement of her letters of administration. But why all this proceeding? The suit was brought by Davis alone as administrator. That such was the fact, was no sufficient ground of demurrer to the joint letters of administration as evidence. They showed that Davis was administrator. "If one of several executors or administrators bring an action of debt or assumpsit, or in tort, it is settled that the defendant can only take advantage of the non-joinder of the co-executor or co-administrator, by pleading in abatement, after *oyer* of the probate or letters of administration, that the other executor or administrator therein mentioned, is alive, and not joined in the action." 1 Chit. on Pl. 22. The defendant pleaded the *non-joinder* of Henrietta Boon, and, in form, the plea is a plea in bar, and on that account ought not to be considered a good plea in abatement. But it is a dilatory plea, and if sustained, and the cause were dismissed, it could be renewed in the name of both administrators. The truth of the plea is not sworn to, and the Judiciary Act declares that "no dilatory answer shall be received or admitted, unless affidavit be made of the truth thereof." Cobb 486. The cause ought, therefore, to have proceeded to trial in the name of Davis as administrator, in whose name

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it was instituted, even if the other proceedings were irregular, which we by no means, hold.

[2.] The conversation in regard to the cause of the injury which took place between Dr. Searcy and Mrs. Winn, or in the hearing of Dr. Searcy, was properly rejected. It was not a part of the *res gestæ*. It was a considerable time after the act which caused the damage, and she was a competent witness. In my opinion, it is extending the principle a great way to allow the declarations of a person to be given in evidence as a part of the *res gestæ*, made at any point of time, who is not a party nor the agent of a party, and who is living, and whose evidence may be procured by reasonable diligence.

[3.] The next assignment of error is on the refusal of the Court to grant a new trial on each and all the grounds taken in the motion. Among the grounds taken, is one that the Court erred in its charge to the jury. There is no error assigned on this charge, plainly and distinctly set forth, as required by the statute. *Acts '55 and '56*, 201. Indeed, no special objection was urged in the argument before us, and in looking through the charge, a majority of the Court think that the law was fairly submitted to the jury. Before the jury could have found a verdict for the plaintiff under the charge, they must have found that if the plaintiff or his servant was not free from fault, yet the defendant by the exercise of reasonable care and diligence, could have prevented the injury or collision, and neglected to do so; or they must have found that if the employees of the railroad saw the carriage of the plaintiff approaching dangerously near, they could have stopped the train, and neglected to do so, so as to prevent the collision, and that the plaintiff at the time used ordinary diligence and precaution to escape the difficulty. One member of the Court is of opinion that the presiding Judge ought to have instructed the jury that, in the event they should find that both parties were in fault, but that of the defend-

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ant was greatest, the quantum of fault of the plaintiff must be weighed, and the damages should be abated accordingly.

We know of no rule for graduating the damages in that way. A plaintiff might be so much in fault as to disentitle him to damages, although the defendant may have been also to blame. It is the duty of railroad companies so to regulate the movements of their trains, near crossings of highways, as to place them under the control of those having the management of the engines, that they may be at once checked or stopped, if there should be danger of injury to persons in passing. Not to do so is a fault. But if they should fail in this duty, and not reduce the speed, and a person near the crossing should wilfully rush in front of the car, to be run over or have his property destroyed, neither he, nor his personal representatives, if he be killed, could have a remedy. The damage in such case would be the consequence of the injured party's misconduct. It might so happen, in a case of mutual negligence, that the jury could not determine the preponderance of the blame, and some authorities say that in such case, there being no mode of apportioning damages, at law, there can be no recovery. 6 *Whar.* 311. But if the parties are not equally in the wrong, how can the damages be apportioned? It would be difficult to set off negligence against negligence and apportion the damage. He who is guilty of the greater negligence or wrong, must be considered the original aggressor and accountable accordingly. In this case, we think that the presiding Judge in his charge to the jury, conformed to the rulings of this Court, in cases arising from this identical collision. We think these rulings are right, and come as near meeting the justice of each case, that may arise, as any that could be laid down.

Another ground in the motion for a new trial is, that the jury found contrary to law. We know of no principle of law violated by their verdict rendered in this case.

[4] Was the verdict of the jury contrary to evidence and

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without evidence, or strongly and decidedly against the weight of evidence? For the purpose of deciding this point it is necessary to refer to the material parts of the testimony delivered to the jury by the witnesses of the respective parties, which relate to the question of negligence. There is no controversy as to the facts of killing the slave and destroying the rockaway, nor is any question raised as to the amount of damages found by the jury. At the time the engine run against the rockaway, on the driver's seat of which the negro was sitting, it was standing on the railroad tract, on the crossing of the public road. According to the evidence of Mrs. Winn, who was in the carriage, when the engine was first discovered by her, it was about two hundred yards above the crossing, and the carriage was about twenty feet from the same point, with the railroad on one side and the fence on the other, and too near to each other to admit of the turning of the carriage. The driver hurried the mules and did every thing in his power to effect a crossing, by whipping and encouraging them, but as soon as they got on the crossing they refused to move, and turned their heads and looked at the engine. She called on the driver to stop, when within twenty feet of the crossing, but he urged the mules on and said it would not do to stop where they were; that there was no way to get out of harm but by crossing, that the mules were not accustomed to the cars. Mr. Robertson, the conductor, did not see the rockaway before the collision, but gives it as his opinion, from facts and circumstances, that the driver, by exercising proper caution and due diligence, could have avoided the difficulty.

William Dougherty, a witness for the defendant, testified that the mules, from fright or some other cause, when the carriage got on the track of the railroad, stopped and refused to move, but stood looking round at the approaching engine until it struck the carriage. The boy urged and whipped the mules to make them move from the track, but to no purpose; they refused to go. The boy and the carriage had

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plenty of time to have crossed over and cleared the track, after getting on, if the mules had not stopped and refused to move out of the way. They were about seven hundred and ninety-two feet from the crossing, when they first saw the negro about twenty feet from the railroad.

The foregoing is the testimony of the plaintiff, and that part of the defendant's evidence which supports it, which applies to the caution and diligence of the driver to avoid the injury which resulted in his death and the destruction of the rockaway.

In opposition to it, Snow the engineer, testified, that when he came in sight of and could see the road crossing, he saw the carriage, and negro on the driver's seat, standing still about twenty or thirty feet from the railroad, and he supposed they would remain there until the engine and train passed by; hence he made no attempt to stop or check the speed of the engine; but when the engine arrived nearly opposite the carriage, and when it was too late for him to stop the engine, the mules and carriage started to cross the railroad track, and the mules from some cause unknown to him, halted before the carriage crossed the track. He made every effort in his power to stop the engine, but it was then too late to do so in time to prevent the accident. In another part of his testimony, he attributes the accident and injury wholly to the carelessness and imprudence of the negro who drove the carriage, and says the road crossing was at an open place, and the driver could have seen the engine when at least an hundred yards from him, and, if not deaf, must have heard it before he saw it. He and the carriage were at least one hundred yards from him, when he saw them standing still about twenty or thirty feet from the railroad, but contrary to all usage and to his great surprise, when the engine arrived nearly opposite the carriage, he started across the railroad in front of the engine, and the mules from fright or some cause unknown to him, halted before the carriage crossed the track. He does not know whether the negro was drunk or not, but

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a broken bottle was found in his pocket, and the cork and his clothes were wet with spirits. The two witnesses, Dougherty and Snow, testify to the declarations of Mrs. Winn at the time, to the effect that she blamed the driver entirely for the injury, and that if he had obeyed her, it would have been avoided. Mrs. Winn testifies, that she thought for a long time the negro was wrong. Col. Whittle was examined. Since the last trial, he visited this crossing, and from the fence and obstructions, a two horse carriage could not have been turned there, within twenty feet of the track, without great danger of upsetting. This is the entire evidence on the issue of the plaintiff's caution and negligence, and if to find a verdict for the plaintiff, the jury must have found this issue in his favor, we see no sufficient reason for disturbing the finding. The jury may have believed that the judgment of the driver was right; that the greater safety of the persons in the carriage, himself, the mules and the carriage, required him to cross the road; they may have believed with Mrs. Winn and Mr. Dougherty, that he had ample time to cross, and but for the perverseness and obstinacy of the mules, he would have passed without injury; they may have believed that he could not foreknow that the mules would obstinately refuse to go forward, when they had got the carriage on the centre of the track of the railroad. The jury may have believed that the witness Snow was mistaken in the principal part of his testimony on this point; they may have believed it to have been impossible for the driver to have forced the mules on the railroad track, in front of an engine, driven at great speed, and when the engine was nearly opposite the driver and carriage; and they may have believed that it was especially impossible for him, by any kind of effort, under the facts testified to by this witness, to have forced the mules on the track in time for them to have halted and looked round before the collision.

The only remaining point for consideration is, whether the jury were warranted in finding negligence on the part of the

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defendant or its employees. It was in evidence that at the place of this catastrophe, there was an up-grade in the road track in the direction the train was going, of thirty-seven feet to the mile. It was in proof also, that the train might have been stopped in going the distance of one hundred and fifty yards. Robertson the conductor testified, that it is the duty of the engineer to look out ahead for dangers and obstructions on the road, and to give notice to the brakeman. Mrs. Winn testifies, that she was looking at the engineer all the time. He did not try to stop the train, but struck the carriage at full speed. She says the whistle was not blown at all, and that the engineer was looking out all the way from the time the train came in sight, until the collision took place. William Robertson, the conductor, testified, that *at the time of the accident*, he was standing on the platform of the baggage car. When the alarm was given by the whistle, he jumped to the brake, with the brakeman, and did all they could to arrest the train. The blowing of the whistle was the first intimation he had, that there was a collision or danger of a collision. John Snow, the engineer, says that he made no attempt to stop or check the speed of the engine, and assigns as a reason, that when he came in sight of the crossing, he saw the carriage and driver standing still about twenty or thirty feet from the Railroad. There is a discrepancy between the evidence of Dougherty and Snow. They were together on the engine. Dougherty says they were seven hundred and ninety-two feet from the crossing, when they first saw the negro about twenty feet from the crossing. In another place, he says that as soon as Snow, the engineer, came in sight of the driver and carriage, he immediately reversed the engine and blew the whistle to put on the brakes, and did all he could to stop it, but it was too late. He cannot say that the negro stopped at all. Mr. Dougherty, in giving an account of this thing to Mr. Brewer shortly after its occurrence, stated, that Snow never blew the whistle until after the engine stuck the carriage. The weight of the evi-

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dence, then, is decidedly against an effort to check the train, until after the collision or at the moment of collision. Taking Snow's testimony alone, and the inference is strongly against his conduct. He saw a driver and carriage within twenty feet of the Railroad crossing, and made no effort to check the rapid movement of the train. But the jury, it is presumed, gave greater credit to the testimony of other witnesses. Mr. Dougherty, who was with him, saw the driver from the moment he came around the curve in the road, and his account of his conduct is in harmony with that given by Mrs. Winn, to-wit: that the driver made no stop before he reached the track, that the mules then halted and could not be driven forward. Those witnesses who testified that the brake was not put on until the moment of the collision, are supported by the unquestionable fact that the crossing could be seen at the distance of from two hundred and fifty to two hundred and sixty yards, and the train was not stopped, which the testimony shows might have been stopped in going one hundred and fifty yards. From the railroad crossing the train ran about two hundred and seventy yards before it was taken up. Mr. Dougherty says he measured it, six hundred feet, sometime afterwards, but is not certain that he measured it to the point of stopping. There was no doubt a *bona fide* intention and effort to stop the train after the collision, and that it was not stopped within the distance that it ought to have been, must be accounted for by the confusion and excitement produced by the occasion. There was much conflict in the evidence in this case, and testimony tending to impeach witnesses on both sides. Of the credit of the witnesses the jury was to judge. The presiding Judge who heard all the evidence and was an eye witness to the manner and deportment of the witnesses who testified on the stand, refused the motion in this case. It seems to us, who can know the evidence only as it is presented on paper in the record, that there was no error in the conclu-

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sion of the Court upon that point, and upon a full view of that and all other points in the record, affirm the judgment.

Judgment affirmed.

LUMPKIN, J. concurred.

BENNING, J. dissenting.

The verdict was for the full value of the property lost. The fault which caused the loss, was, I think, in both parties. When this is so, the loss, I think, ought to be borne by both parties, each party bearing a part proportioned to his part of the fault.

See my opinion in *Macon and Western Railroad vs. Winn*, decided at Macon in June, 1858.

Hence, I think, that the damages were too large.

Consequently, I must dissent from the judgment of the Court.

WILLIAM C. SCOTT, plaintiff in error, vs. GIDEON NEWSOM,
defendant in error.

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[1.] If testimony be admitted by the Court to enable the party introducing it, to make it applicable to the case by the introduction of other proof, after the introduction of such other proof, the objecting party must move to withdraw it, and if he does not, it must be held that he acquiesces in its remaining before the jury.

[2.] The administrator of an intestate's estate has a qualified interest in the real estate of his intestate, for the payment of debts and making distribution; and if it is not required for either purpose, his failure to sue a tenant in possession must not be held to prejudice the heirs at law.

[3.] The purchase of land, payment of the consideration, taking possession and

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making valuable improvement, is sufficient to relieve a parol agreement for the purchase from the operation of the statute of frauds.

[4.] When there is positive evidence in support of a verdict, though there is evidence on the other side strongly conflicting with it, this Court will not reverse the judgment of the Judge presiding in the Court below refusing a new trial.

In Equity, in Taylor Superior Court. Tried before Judge WORRILL, at October Term, 1858.

The facts of this case are fully set forth in the following opinion of the Court.

CULVERHOUSE & ANSLEY, for plaintiff in error.

GEO. R. HUNTER, *contra*.

By the Court.—McDONALD, J. delivering the opinion.

Nancy C. Price and Maria A. Price, orphan sisters, in the lottery of lands which lay in the county of Muscogee, at the time of the lottery, drew lot of land number two hundred and ninety-eight, in the first district of that county. The original survey of that district was wrong, which made a re-survey necessary, and by the re-survey, lot number two hundred and ninety-eight in the old became and was designated as lot three hundred and one in the new survey, and a grant was thereupon issued to said orphans, for number three hundred and one. A man named Thomas Scott married Maria A. Price, and a man named William Cosper married Nancy C. Price, and they both entered into possession of said land. In 1833, one William Smith sued the defendant in error, in an action of trespass, for alleged trespasses on said land, and obtained a verdict. The defendant appealed. Smith, in his declaration, described himself as the agent of Scott and Cosper, who had removed to another county, and left him in possession of the land. Scott died, and William Burgess took out letters of administration on his estate in the county of Gwinnett. During the pendency of the action of trespass

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on the appeal, Smith, the plaintiff, filed a bill in chancery, alleging the foregoing facts, and that his remedy at law was inadequate; that the defendant was claiming the same tracts of land by the same number drawn by a different person from whom he had obtained a conveyance. Smith alleged in his bill that Burgess administered on the estate of Thomas Scott, on the seventeenth day of December, before he filed his bill, and that he bargained with Cosper and Burgess for the land, took possession of it under said purchase, and made valuable improvements thereon. The bill alleged, further, the trespass for which the common law action was instituted, and prayed an injunction, &c.

The defendant answered, denying complainant Smith's title to the land, and that it was drawn by the said orphans, and claiming it himself under another title. This cause was tried at February Term, 1833, and the jury decreed in favor of the complainant Smith. The defendant appealed, and the cause was tried on the appeal, at the August Term, thereafter, with the same result. The plaintiff in error is the son of Thomas Scott, and, as his heir at law, has instituted an action of complaint for the recovery of the land, against Gideon Newsom, the defendant in error. He and Mary A. Scott his mother, had previously instituted a suit in chancery, for the recovery of one-half of said tract of land, which was dismissed on demurrer. The judgment of the Court on that demurrer was plead in bar of Scott's suit at law. But that point was not seriously insisted upon; and if it had been, it is not tenable; the parties are not the same, and it does not appear that the title was the same.

During the pendency of the action by the plaintiff in error for the recovery of the land, the defendant in error filed a bill against him, on which a decree was rendered in favor of the complainant below, on the finding of which the plaintiff in error moved for a new trial, which was refused by the presiding Judge in the Court below, and his judgment thereon is assigned for error.

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The defendant in error alleged in his bill, the filing of the bill by Smith, his answer thereto, as hereinbefore stated, and the decree rendered thereon. It alleged, additionally, that Thomas Scott and William Cosper, according to his best recollection and belief, assisted Smith in his litigation with him. The bill alleges, further, that Smith purchased the land either from Scott, in his lifetime, or from Burgess, his administrator, after his death, the half of the land claimed now by Thomas C. Scott; that he went into possession in Thomas Scott's lifetime; and his (Scott's) administrator attended both trials for said land, and that the heirs at law were represented by the said administrator. The bill further alleges, that William Cosper was present at one or more of said trials, taking a part therein, and that Smith put his title altogether on the title derived by his purchase from Cosper, and from Scott himself, and from his administrator. The bill alleges, in addition, that the jury passed upon Smith's title, and adjudged it to be good; that Smith remained in quiet possession of the entire land, under the verdict and judgment, until 1836 or 1837, when he purchased from Smith, paid him \$400 in cash, and took his bond for title, which was deposited in the Clerk's office of Taylor county, and has been lost or mislaid.

The bill sets forth the manner in which he obtained title to the other half of said tract of land; but as there is no controversy respecting that in this suit, it is unnecessary to refer to it. The complainant alleges, that he took possession of the land in 1836 or 1837, and remained quietly in possession until 1852, when the suit in equity was instituted against him by William C. and Mary A. Scott. The bill alleges, further, that to William C. Scott's action at law for the recovery of one-half the said tract of land, he, the complainant, being defendant in that action, pleaded the statute of limitations and other issuable pleas; and that on the trial, he showed by the record from Gwinnett county, that Burgess was appointed administrator of Thomas Scott in January, 1853; that on the trial of said cause, a verdict was found for

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Scott; that the defendant appealed, and that said appeal was then pending. The bill further alleges that, at the time complainant purchased, he had no knowledge of outstanding claims to the land, which had not been litigated and determined, that he had purchased the said land in good faith, and paid a valuable consideration therefor; that those under whom he claims had been in possession of the premises; that his own possession had been notorious, adverse and peaceable, for twenty years or longer; that the said Burgess, the administrator, as the complainant believed, knew of his purchase and possession of the land, and made no effort to disturb him, and that all parties had acquiesced in the judgment in favor of Smith, hereinafter referred to, and no suit was instituted for said land until 1852. Newsom, the complainant, amended his bill and alleged, that Scott and Cosper, and their families, lived on the land in dispute until the fall of 1832; that about that time they sold the land to William Smith; that both of them admitted that they had sold to Smith; that Smith took no written conveyance from them, but went into possession of the land in the winter of 1832, under the said parol purchase, claiming the land as his own, and in his own right, and made improvements, and kept possession peaceably, except the intrusion hereinbefore stated by Newsom, the complainant, until 1836, when the said Smith sold the land to complainant; that he, complainant, then went into possession, and has remained ever since in quiet, peaceable, and adverse possession of said lot of land, with the exception of the suits herein referred to; that complainant believes from the facts, that but for the death of the said Scott, which took place in the latter part of 1832, shortly after Scott and Cosper moved from the land, leaving Smith in possession, Smith would have obtained a conveyance of the said land from Scott; that Burgess, the administrator of Scott, recognized the claim, by allowing Smith to remain in possession of the land, &c.

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The plaintiff in error answered the bill, and admitted the suits at law and in equity, but alleges that he was an infant, and not a party to any of them instituted prior to the 25th of March, 1851, at which time he arrived at the age of twenty-one years; that he suspects they were carried on by a fraudulent combination between the parties to obtain a legal advantage by the judgments. The answer admits that Burgess, the administrator, made a bond, but it denies that the defendant (plaintiff in error,) ever received a cent by the illegal and fraudulent bargain. The answer denies that Newsom, the complainant, controverted Smith's title, but alleged that he contended that lot 301 was 296, and put the issue on the identity alone of the premises. The answer denies, upon information and belief, that Smith purchased of Thomas Scott his interest in the land; but it admits Smith's possession of the premises, and denies his right to sell his (Scott's) interest therein. It alleges that Burgess, the administrator, had no authority to sell the land, and that Newsom, the complainant, was bound to know it, and it insists that he knew he was not getting a good title under the bond. It denies that the judgment on the demurrer, filed to the bill in chancery, instituted by him and Mary A. Scott, as hereinbefore mentioned, concluded him, as the only ground in the demurrer was that the complainant had an adequate remedy at law. The answer further denies that Scott and Cosper remained in possession of the land until the year —, and that Scott ever sold the land to William Smith, either by deed or parol, and insists that no evidence of the sale can be admitted, except it be in writing, signed by the party to be bound thereby. The answer alleges, that the defendant does not believe that Scott ever admitted that he had sold to Smith; and denies that Smith went into possession of the land otherwise than as tenant of Scott and Cosper. It alleges that he never claimed the land adversely to Scott, in his lifetime, and that the defendant having been an infant, the possession was not adverse to him.

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The complainant, on the trial, introduced —— Hobbs, as a witness, who testified that he heard Cosper say he had sold to Smith; witness thinks the expression used was, "we have sold." Scott was not present. He testified that Smith went into possession under a purchase from Cosper and Scott.

Jesse Tennison was examined as a witness by complainant, and testified that he heard Scott and Cosper say they had sold to Smith, and heard Smith say he had sold to Gideon Newsom.

Joshua Tennison testified the same, and additionally, that Smith said Newsom had paid him. The jury found in favor of Newsom, the complainant, and decreed a perpetual injunction of Scott's, the defendant's, common law action. The defendant moved for a new trial on the grounds,

1st. Because the verdict of the jury is contrary to law, and strongly and decidedly against the weight of evidence.

2d. Because the Court erred in not rejecting that part of the testimony of a witness named Hobbs, which was objected to.

[1.] The objection to Hobb's testimony is not strongly insisted upon here. It was admitted by the presiding Judge, to allow the complainant, by evidence to be introduced, so to connect it with other proof, as to make it legal. After hearing other testimony, no motion was made to withdraw it. The same witness testified that Smith went on the land under a purchase from Cosper and Scott. If counsel believed that Hobbs' evidence was not so connected with other evidence subsequently given, as to bring it within the decision of the Court, they ought to have moved to withdraw it from the consideration of the jury. Not having done so, they must be held to have acquiesced in the propriety and legality of its remaining before the jury.

[2.] For the defendant in error it was insisted that the verdict or decree of the jury was not contrary to law, because the plaintiff in error, who was plaintiff in the action at law also, was barred in that action by the statute of limitations. The plaintiff in error was an infant, and within the saving

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of the statute. He was not barred. But it is insisted that there was an administrator of the estate of the ancestor, and he ought to have sued. The rulings of this Court have been, that on the death of the ancestor intestate, his estate in lands is cast on his heirs at law, but that there is a qualified estate in the administrator, for the payment of debts, or for making distribution. If the land is not required for either of these purposes, the administrator need not sue, and his failure to do so, must not prejudice his heirs at law.

[3.] We think that there was sufficient evidence in this case, if true, and the jury must have found it so, to relieve the case from the operation of the statute of frauds. There was evidence of purchase, payment, possession long continued, and valuable improvements.

There was conflicting evidence in this case, and so difficult is it of reconciliation, that we shall not attempt it. We do not say that we should have rendered the verdict which the jury did, had it been our province to act in their stead; but there was positive evidence in support of the verdict, and there are strong circumstances and admissions in conflict with it.

[4.] The presiding Judge who heard the entire cause, upon a consideration of the evidence on both sides, has refused to recognize that as a good objection to the verdict, and we will not overrule him on a ground which must derive much of its merit from what transpires before him on the trial of the cause.

Judgment affirmed.

Ex'ors of Everett vs. adm'r's of Whitfield.

**The executors of JAMES A. EVERETT, plaintiffs in error, vs.
The administrators of ELIZABETH WHITFIELD, defendant
in error.**

Although time may be running against an equitable title, yet, if that title comes to an infant, time will cease to run against it, during the infancy; equity in this respect, following the statute of 1817.

As to when the evidence is sufficient to warrant particular charges.

In Equity, in Houston Superior Court. Tried before Judge LAMAR, at October Term, 1858.

This cause came before the Supreme Court upon the following bill of exceptions:

Be it remembered, that on Monday the first day of November, 1858, during the regular October Term of Houston Superior Court, the honorable Henry G. Lamar, Judge of said Court, then and there presiding—the cause of Adolphus D. Kendrick and Myles L. Green, as executors of the last will and testament of James A. Everett, late of Houston county, deceased, against Henry H. Whitfield, as administrator of Elizabeth Whitfield, deceased, the same being a bill to enjoin a common law action, and to quiet complainant's possession to the property therein specified—came on to be tried, was called in its order on the appeal docket, both parties announced ready, a jury was empanelled, and the parties were at issue before a special jury. By consent, the common law action and the bill were tried together. Complainants, after the reading of the bill and answers, submitted in evidence, (having laid a good foundation therefor,) a bill of sale from Joseph Mims, Sheriff of Houston county, dated 6th day of March, 1828, to James A. Everett, for thirty-two negroes, a copy of which bill of sale is as follows:

GEORGIA, Houston County—Know all men by these presents, that Joseph Mims, Esquire, Sheriff of Houston county, for and in consideration of the sum of six thousand seven

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hundred and ninety-one dollars, to him in hand paid at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath bargained and sold, and by these presents, and by virtue of the powers in him vested as Sheriff aforesaid, and of an execution issuing out of the Superior Court of the county of Putnam, bearing date, the fourth day of October, eighteen hundred and twenty-five, which the executors and executrix of Stephen W. Harris, deceased, plaintiff, and George B. Whitfield, defendant; and several other *slaves* vs. said Whitfield, I, Joseph Mims, Sheriff, as aforesaid, doth bargain and sell unto James A. Everett, of the county of Crawford, and State aforesaid, thirty-two negroes, namely; Dick, a man; Ralph, a man; Bob, a man; Dempsey, a man; Simon, a man; Isaac, a boy; Sharper, a boy; Patrick, a boy; Mose, a boy; Orange, a boy; Emily, woman, and child Taby, a girl; Fillis, a girl; Minny, a girl; Sarah, a girl; Alsy, a girl; Hauner, a girl; Lydia, a girl; Violet, a girl; Lynda, a girl; Ginney, a girl; Biner, a girl; Hester, a girl; Letty, a girl; Patty, a girl; Feeby, a girl; Jude, a girl, which I, Joseph Mims, Sheriff, did this day expose at public outcry, under the execution aforesaid, and the said James A. Everett being the highest and best bidder, was knocked off to him at the price or sum of six thousand seven hundred and ninety-one dollars. To have and hold the negroes aforesaid, unto the said James A. Everett, his heirs and assigns forever, as they were held by the said George B. Whitfield.

In witness whereof, the said Joseph Mims, Sheriff aforesaid, hath hereunto set his hand and seal, this 6th day of May, 1828. (Signed,) JOSEPH MIMS, *Sheriff, [L. S.]*
In presence of

SIMON BATEMAN,

EDW'D WELCH, *C. S. C. H. C.*

GEORGIA, Houston County—Clerk's office, Superior Court.
Recorded in book I, page 592, this April 25th, 1854.

WM. H. MILLER, *Clerk.*

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Complainants then read in evidence, an execution of which the following is a copy:

GEORGIA, Putnam County—To all and singular the Sheriffs of said State, greeting:

We command you, that of the goods and chattels, lands and tenements of George B. Whitfield, you cause to be made the sum of six hundred and fourteen dollars and eleven cents, principal, and the further sum of one hundred and thirty-nine dollars and seventy cents interest, up to the 25th day of March, 1827, and the further sum of thirteen dollars twelve and a half cents, for cost, with interest, and the principal sum from the 25th day of March, 1827, which Daniel Parish, William S. Miller, Henry Parish, Joseph Kernochan, and Ephraim Holbrook, late trading under the name and style of Parish, Miller & Co., lately in our Superior Court of said county, recovered against him for their principal, interest and cost: And that you have said several sums of money before the Judge of said Court, on the third Monday in September next, to render to the said Parish, Miller & Co., the principal, interest and cost aforesaid; and have you then and there this writ.

Witness, the honorable Owen H. Kenan, Judge of said Court, this 7th day of April, 1827.

(Signed,) WILEY WILSON, Clerk.

Entries on the said fi. fa.

Levied the within on four hundred and five acres of land, more or less, whereon defendant now lives, 3d December, 1827.

H. W. RALEY, Sheriff.

The above levy sold 1st day of January, 1828, for ninety-one dollars, and the money paid to a *fi. fa.* of older date than the within *fi. fa.*, this 1st January, 1828.

H. W. RALEY, Sheriff.

Levied the within *fi. fa.* on thirty-two negroes, March 10, 1828.

JOSEPH MIMS, Sheriff.

The above levy sold on the first Tuesday, in this instance

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for \$6,791, and the whole of the money paid to older *fi. fas.*
14th May, 1828. JOSEPH MIMS, *Sheriff.*

Levied the within *fi. fas.* on 2,323 acres of land, lying on
Flint river, 10th June, 1828.

JOSEPH MIMS, *Sheriff.*

The above levy sold for eleven dollars, the money paid for
cost. JOSEPH MIMS, *Sheriff.*

Complainants then read in evidence the exemplification
and exhibits from Putnam Superior Court, and from the exe-
cution docket of Putnam Superior Court, all of which are
attached to the bill as a part of the pleadings, and which
plaintiffs in error pray leave to refer to as part of the evi-
dence to be considered as embodied herein.

Complainants also read in evidence, a copy of the last will
and testament of James A. Everett, also exhibited to the bill
as part of the pleading, and which they also pray leave to
refer to as though embodied herein.

It having been omitted in the proper place, complainants,
before reading in evidence the bill of sale from Joseph Mims,
Sheriff, to James A. Everett, showed diligence and exhaust-
ed all the resources in their power, to produce the original *fi.*
fa. of the executors and executrix of Stephen W. Harris vs.
George B. Whitfield, and after said proof of diligence, the
Court allowed said bill of sale, and the exemplification and
records of Putnam, attached to the bill to be read in evi-
dence.

Complainants then read in evidence the depositions of
John Hiley, taken by commission, who testified he knew the
parties, and knew George B. Whitfield. First acquaintance
with him was sometime during the year 1828. At first, it
was casual, afterwards intimate. He lived a little over a
mile from me. That he knows nothing about the negroes
having been in the custody of the Sheriff of Houston coun-
ty. I do not know that I know the names of any of the
negroes at issue between the parties, but one of the negroes

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that belonged to George B. Whitfield was named Ralph, pronounced commonly Rafe, another name was Dick. I do not now remember any other names, though I might remember others by long study. The negroes remained in Whitfield's possession until after the crop of 1828 was gathered. Mr. James A. Everett then sent his wagon after them and took them away peaceably and quietly. I was present at the time. I went to do blacksmith work for myself. I saw Mrs. Whitfield there, but did not see Mr. Whitfield. So far as I know, Mr. James A. Everett exercised and claimed control of the negroes ever afterwards. As well as I recollect, George B. Whitfield lived in the neighborhood about four years after he parted with the possession of the negroes. He moved at first, I believe, to Henry county. The names of the negroes, and the circumstances under which they left, I have already stated as well as I can in answer to the fourth interrogatory. Has already stated these things in answer to the fourth direct interrogatory. Mr. Whitfield never expressed his feeling, or had any conversation with me about the transaction. Knows nothing about what part of the crop of 1828, Everett was to have. Mr. Whitfield was an intemperate man. I do not think any drunken man is capable of transacting his business when in a state of intoxication. Mr. Whitfield was a man, when sober, who knows how to attend to business. I know nothing about the sale. If Mr. Whitfield ever complained, he never did to me. Know nothing more that will benefit defendant.

Complainants then read in evidence the depositions of *William West*, who testifies as follows:

He knows the parties, and has heard Everett and Whitfield talk about trading, and the trade was about negroes. Witness does not recollect all that was said, but heard George B. Whitfield urge Everett to take up executions that were against him from Putnam county.

The above conversation was at Everett's house.

As near as witness recollects, Whitfield wanted Everett to

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take up the executions and take a mortgage on his negroes. Witness says they were Whitfield's negroes. Witness did not hear anything about a sale of negroes between Everett and Whitfield. He did hear Whitfield urge Everett to take up said executions and take control of them; he heard nothing about selling property. What induced Whitfield to urge Everett to take up the executions, was that the Sheriff was after Whitfield's negroes or property, and he could not get the money to take up said executions—that was his reason for wanting Everett to take up said executions. Whitfield did propose to give Everett a mortgage on the negroes, but witness does not know whether he did, or did not. Witness did oversee for Everett in 1825, 1826, 1827, and six months of the year 1828. Witness had Mingo and Bob, that was of the Whitfield negroes. It was in the latter part of 1827 and 1828, he overseed there, a part of the time in the lower 14th, and a part of the time at the place where Everett lived. Everett bought Mingo and Bob at Sheriff's sale, does not recollect what month they were sold. Whitfield remained in the neighborhood after the sale—never heard of his setting up any claim to said negroes. Whitfield did get corn from Everett in 1826; he got 600 bushels, at \$1 25 per bushel; does not know on what account it was got. Everett and Whitfield lived about four miles apart, does not know when Whitfield left the neighborhood, cannot say where he lived when the negroes were sold by the Sheriff.

Witness was born in North Carolina, in the year 1796. If you will subtract 1796 from 1856 you have my age. He lived in the lower 14th district Houston county, Ga. He is a farmer by occupation, has lived in this county about thirty-one years—he did oversee for Everett in the years 1825-6-7, and part of the year 1828; he gave me \$200 a year. Witness lived on the Hog-crawl place a part of the time, and at the home place the balance of the time. At the Hog-crawl place he worked from five to ten hands, names are Peter, Ned, Hannah, Lucy, Chaney and Peter; then there was Bob

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and Mingo, of the Whitfield stock, then there was Sandy, Larry and Pompey, and Peggy, then there was none of the Whitfield stock but Bob and Mingo. Witness did not sleep and eat in the same house with Everett, he only acted as overseer for Everett. Mr. Green did transact business for Everett, has heard a conversation between Everett and Whitfield, but nothing about the sale of negroes, do not recollect the time, the place was at Everett's house. There was no one present but Everett, Whitfield and myself; it was in the day time—does not recollect all that was said. Witness was at Mr. Everett's on business and found Whitfield there. Witness never heard Mrs. Elizabeth Whitfield's name mentioned. I heard them talk about a mortgage, but never heard that Everett had a mortgage on any negroes. Witness says he never heard Everett say anything about buying in the negroes for Whitfield—does not know where they went to—does not know anything about Green's going to Whitfield's and taking away the negroes in the absence of Whitfield, does not know anything about Whitfield's being displeased and threatening to kill Everett. Witness never saw Whitfield intoxicated, does not know anything about Everett's getting Wm. Whitsfield to live with him in Fort Valley. All told that witness knows.

Complainants then read in evidence, the depositions of Jefferson J. Westberry, taken by defendant, who testified, he knew the parties, and he did manage the plantation of James A. Everett in his lifetime for nine years. I knew negroes on his, Everett's plantation, called by him and others, the Whitfield negroes, the names of many of them, as well as their ages, I have forgotten ; but I give the following names of such as I can remember. Lidd, Senior, Dick, Bob, Dempsey, Ailsey, Mingo, Sarah, Emily, Violett, Jude, Plym, Philis, Biner, Tabby, Patty, and a child of Sarah, and Lett and Charity, children of Mingo ; there were others, children of these negroes, but the names of them I disremember. Lidd, the younger, Stephen, Orange or Mack and Mose. I do not

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remember any of their ages positively, I cannot give the value of the negroes or their hire, having been unacquainted with them for several years past. I do not know how Everett got possession of said negroes. I do not know anything more that will benefit the defendant. I have not said what any one said about any negroes. I overseed or managed for James A. Everett, except what he (Everett) himself said. I suppose, from Mr. Everett's calling certain negroes the Whitfield negroes, that those negroes had once belonged to Whitfield. I am unable to state fully, any conversation that passed between me and Everett, but I remember hearing Everett say he bought said negroes at Sheriff's sale, and that they were sold as the property of Whitfield. I overseed for James A. Everett at one time, seven years, commencing in December, 1832, and leaving there on or about the 1st of January, 1840. I was then absent from his plantation for two years, when I came back and overseed for him for one year and ten months. I did not know G. B. Whitfield, and consequently, know nothing of his ever having lived East of Flint river, or of his being rational or irrational. I know nothing more that will benefit Everett's executors. Here complainants rested.

Defendant then read in evidence, his letters of administration on the estate of Elizabeth Whitfield, in the usual form, from the Ordinary of Putnam county, dated ————— 1853.

Howell Cobb introduced as a witness for defendant, testified: Col. Howell Cobb was present at the sale of the negroes, 6th May, 1828. His attention was called to the sale because the manner of the sale was unusual, and the negroes were not put up in the usual way, but all in a lump. Everett was the purchaser. There were a good many negroes, but how many, I do not know. He cannot say that those now in controversy were among them.

As to the objects of the sale and its unusual manner, he derived his information from Whitfield, of whom he inquir-

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ed, because Whitfield had been his friend—although Everett was present on the ground—he could not say that he heard the explanation given by Whitfield. (The Court ruled that the sayings of Whitfield could not be given without it was proven that Everett heard them.) Where the negroes went after the sale, he did not notice. Don't know when Whitfield left the county, but he remained there several years after the sale. The negroes were sold in a lump. Does not know whether that (the lump) included the whole of the negroes, but knows that the lot was unusually large. It is not usual to put up negroes in families at Sheriff's sales—whether the negroes put up were one family, he does not know, but he thinks not.

Defendant then read in evidence the depositions of *Joel Branham, James Nicholson and William B. Carter*, all of whom testify they were acquainted with plaintiff, but not with defendant. James Nicholson answers, he knew Elizabeth Whitfield in her lifetime, that he knew her in Eatonton, this place, that she was then living with her son, George B. Whitfield, and that she died at his house, in this place, about the year 1825 or 1826, according to the best of his recollection. Joel Branham says he knew Mrs. Whitfield, that she lived and died as stated by James Nicholson, only his recollection is, she died in 1825.

Wm. B. Carter says he is not able, from his knowledge of the facts.

James Nicholson and Joel Branham answer, Mrs. Whitfield came to Georgia, and to this place, (Eatonton,) about the year 1825, and it was understood she came from S. Carolina. Joel Branham says she brought a considerable gang of negroes with her. Whether they were hers or not, he does not know. Does not remember how many, and does not know whether she died in possession of the said slaves or not. James Nicholson does not know anything of the facts jointly answered by Joel Branham and James Nicholson. William B. Carter knows nothing that will enable him to answer the

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third direct interrogatory. Joel Branham and James Nicholson say, George B. Whitfield did have a large estate at the time, and before his mother came to live with him, how many slaves, deponents do not remember—there was a considerable number. Wm. B. Carter knows nothing of the facts enquired of in this interrogatory. The witnesses all answer, Wm. B. Carter is Ordinary of said county. Wm. B. Carter answers, upon examination of the records in his office, he finds that administration has never been granted upon Elizabeth Whitfield's estate, except to Henry H. Whitfield.

Joel Branham and James Nicholson answer that Elizabeth Whitfield came to Putnam county about the year 1825. That her son, George B. Whitfield, came first. That she did live with her son, George. That George was living here when she came out, and that he did not, as well as the witnesses recollect, come with her. That George B. did come out to this place, about the year 1823 or 1824. Don't remember that he remained one year and then went back after his mother and property. Witness Branham only knows that she brought negroes with her. Nicholson knows nothing. Carter knows nothing of the facts enquired about in this interrogatory. Branham and Nicholson know not whether there were any other children, except George B. Whitfield. Carter knows nothing. They all answer, the tax books are not in their custody and that they cannot answer the question in this interrogatory. They have all answered all that they know.

The defendant then read in evidence, the depositions of *Edward Varner*, who testified: He knew Elizabeth Whitfield in the county of Putnam. I learned from Elizabeth Whitfield and her family that she came from South Carolina, or near the line of North Carolina. Mrs. Elizabeth Whitfield died in Putnam county. I do not remember what time she died, but it was many years ago. She lived on a plantation in Putnam county, and had about twenty negroes, more or less, which were with her at the time of her death.

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I only remember one of the negroes' names, and a negro by the name of Sharper, an old man. I knew George B. Whitfield in the county of Putnam. He had about him, near fifty negroes. I do not know what he was worth. George B. Whitfield, according to my understanding, was the only child of Elizabeth Whitfield at the time of her death. I do not know that George B. Whitfield was distributee of Elizabeth Whitfield, but suppose he was. I do not remember whether or not, she lived in the house with George B. Whitfield, but think she did not live in the same house. I do not know that George B. Whitfield did control the negroes on the plantation. I only know it by her having them in possession, when she moved into Putnam county. If she had any title but possession, I do not remember. I never saw any paper title. I never saw any paper title that I have any recollection of. I do not know that George B. Whitfield was the only heir or not, but suppose he was entitled to the property of his mother. In regard to the property's being sold, I know nothing more than report, and that was, the property was sold. George Whitfield died, I think, in Houston county. Have stated all I know about the property.

Answers of *Sarah Whitfield*, taken by commission. She answers: I know Miles L. Green and Henry H. Whitfield, but I do not know Adolphus D. Kendrick.

I knew Elizabeth Whitfield in her lifetime. I first became acquainted with her in 1820, in the State of South Carolina, and was well and intimately acquainted with her from that time until her death, which took place in the year 1825, in Eatonton, Putnam county, Georgia.

The said Elizabeth Whitfield did own and possess in her own right, in the State of South Carolina, land and negroes. I cannot state how much land she owned, but she owned and possessed sixteen negroes.

The said Elizabeth Whitfield did bring to Georgia with her, in the year 1824, the said sixteen negroes, and one more which was born on the road while she was moving to Geor-

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gia, named Mose. The names of the sixteen negroes were, as well as I can remember, Hannah, Lid or Lidia, Binah, Stephen, Orange, Ailsy, Violet or Vilett, Jude, Plymouth, Juny, Unity, Ann, Taby, Jansey, Dempsey and Daniel. She did die in possession of all these slaves, seventeen in number, including the said Mose. I am the widow of George B. Whitfield, and we were married the 5th of October, 1820, and we did live together till his death, and he died the 1st day of April, 1839. We went to the State of South Carolina in October, 1820, and remained there until February or March, 1823, when we removed to this State. My husband always said he moved to Georgia to gratify me, as my parents and relations were all in Georgia, and I preferred living near them. He was a widower when I married him.

The said George B. Whitfield did have a large property when we married, and his father, William Whitfield, was a man of a large estate when he died. She does not know anything of Elizabeth Whitfield taking into her possession all the estate of her husband, as his administratrix on his death. He died in Marlborough District, South Carolina, some two or three years before I went to South Carolina, which was in 1820. He left only one kin, the said George B. Whitfield, who was my husband. The said George B. Whitfield left living at his death, nine children, to-wit: William S. Whitfield, born 18th April, 1814; Emily E. Whitfield, born Nov. 8th, 1815; George B. Whitfield, born 12th July, 1822, who died without issue. Henry H. Whitfield, born the 11th April, 1826; Dervitt C. Whitfield, born 22d February, 1828; Elizabeth Whitfield, born 19th July, 1830; Josephine Whitfield, born 19th November, 1832; John F. Whitfield, born 16th, 1836, and Flora Victoria Whitfield, born 5th of January, 1839, who also died without issue.

The said Elizabeth Whitfield and her slaves did not remove with the said Geo. B. Whitfield to Georgia, at the same time, but they removed to Georgia, at about a year afterwards. When we left she did not know she would move to Georgia

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at all. She had not then become willing to move. None of the slaves of the said Elizabeth, came with me and my husband to Georgia, but they came about a year afterwards as before stated. Their names, as before stated, are as follows, to-wit: Hannah, Lidia, Binah, Stephen, Orange, Ailsy, Violet, Judy, Plymouth, Juny, Unity, Ann, Jansy, Taby, Dempsey and Daniel, also Moses, born on the way.

My husband did settle and live in Putnam county, Georgia, when he came from South Carolina, and he lived there about four years and he moved from Putnam to Houston county.

My husband, the said Geo. B. Whitfield, moved to Houston County in 1826, and he did, after the death of the said Elizabeth Whitfield, take her slaves to Houston county.— Her slaves that he carried to Houston county, were seventeen in number, and were the same that she brought with her from South Carolina. He carried to Houston, of his own slaves, thirty or forty, I do not remember the precise number, and of the estate of Elizabeth, seventeen, as I have just stated. After his removal to Houston county, the habits of the said Geo. B. Whitfield were dissipated in their character. They were intemperate, and his mind was at times much impaired by dissipation, so much so as to often render him unfit for business, and he was most of his time in that condition, under the influence of spirits, and unfit to transact business.

The negroes, after the sale, came back to the house and possession of the said George B. Whitfield, and remained there about a year, when, in the absence of the said George B. Whitfield, the said negroes were taken off by a man by the name of Green, so well as I recollect, who was acting as the agent of Everett, and carried to Everett's house and possession.

I saw the said negroes in the possession of the said Everett several times in his life time, and once since his death

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I saw them in the possession of his estate. I did visit the plantation of Everett since his death, in company with defendant to see said slaves, and ascertain how many were there. When we first arrived, the overseer was not at home, and when we had gone round and seen nearly all the slaves, and got a list of their names and ages, of the younger ones, he came home and ordered us off, and when he learned from his daughter, I suppose, that we had a list of the names of the younger negroes, he said unless we give it up our horses were taken up and we should not go till he could get an officer and have us arrested, and abused my son and Mr. Blalock very much. I at last gave up the list of the names and ages of the younger negroes to him, and we then got our horses, paid our bill for supper, &c., and left late in the night, after receiving this very unkind treatment and abuse from the overseer, as I have stated. The overseer's name that was at Everett's plantation was Richard Clervis, as I afterwards learned. It was about a year, after the said George B. Whitfield moved from South Carolina to Georgia, with his negroes and property, before the said Elizabeth Whitfield removed with her slaves to Georgia.

I do not remember anything more at this time, that will be in favor of the defendant, unless it be the fact that I know the said seventeen negroes, which I have before mentioned and described, were the property of the estate of the said Elizabeth Whitfield, and did not belong to the said George B. Whitfield. I knew the negro boy Mose or Moses, belonging to Elizabeth Whitfield. He was born on the road when the said Elizabeth was moving to Georgia from South Carolina in 1824, as well as I remember.

Answer to Cross Interrogatories.

I am the mother of Henry H. Whitfield, and the widow and relict of George B. Whitfield deceased. I have no interest in the event of this suit, that I am aware of, and never had any; and if I did have, before giving my testimony, I

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have relinquished all that I might have had, and shall not be gainer or loser by its result.

I live in the city of Griffin, at my own house, and with my daughter. Geo. B. Whitfield died on the first day of April, 1839, in Hayneville, Lowndes County, Alabama. He lived in Houston County, I think, about seven years after May, 1828. He moved from Houston County, first to Henry County, Georgia, and from there to Lowndes County, Alabama. I did go in the company of Henry H. Whitfield and Richard Blalock, in the spring of 1854, to the plantation of James A. Everett's estate on Hog-crawl Creek, in Houston County, but I did not impose myself on Mrs. Clervis, the overseer's wife, in the absence of her husband, for we did not know he was absent until we had stopped. We asked to stay all night, and his wife gave us permission to do so. This is all the imposition that was used. We did, after getting supper, and before Mr. Clervis came home, go out to the negro houses in company with his daughter, his wife saying she was too unwell to go, but I did not point out the old negroes to Mr. Blalock, that I knew in South Carolina, for he knew the old negroes as well as I did. And the old negroes, at my request, did point out their children so that they might be identified by Mr. Blalock, and he has not testified from negro news, that I am aware of, in this case. And Mr. Clervis, when he came home and learned that we were trying to find out about the negroes, did order us all off, and took from me, not from my son, a memorandum that he had made. This was in the spring of 1854, and I have answered fully all these things.

¶ He was wild, but in South Carolina I do not think he was much dissipated or of very irregular habits. He was inclined, I think, to drink and bet on horse races. I do not know that he gambled. I have answered truly and fully so far as I know.

George B. Whitfield became so intemperate as to affect his mind, when under the influence of spirits, in 1824 or 1825,

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and he was from that period generally under the influence of spirits, and drank very hard up to the time of his death. His nearest neighbors that I suppose knew his situation, were John Highley, Daniel Pitts, John Matthews, William Cole, Nicholas Taylor and Daniel Whatly or Watly. I believe when he was sober his mind was good enough to attend to his business as long as he lived in Houston or any where else, but he was not while in Houston, sober very long at a time. He moved from Houston first to Henry County, Georgia, and then to Alabama.

George B. Whitfield, was the only child and heir at law, living, of Elizabeth Whitfield at her death. I do know that at the death of Elizabeth Whitfield, she left any other child than George B. Whitfield. She died in the year 1825. The ages of old George B. Whitfield's children, are as follows: William S. Whitfield, born 18th April, 1814, Emily E. Whitfield, now Emily E. Veasey, born November 8, 1815, George V. Whitfield, born July 12, 1822, Chas. J. A. Whitfield, born Aug. 1, 1824, Henry H. Whitfield, born 11th April, 1826, De-Witt C. Whitfield, born 22d Feb, 1828, Elizabeth Whitfield now Elizabeth Spear, born 19th July, 1830, Josephine L Whitfield, now Josephine L. Williams, born Nov. 8, 1832, John F. Whitfield, born March 16, 1836, and Flora Victoria Whitfield, born Jan. 5, 1839. Of these children, William is dead, leaving issue, Charles J. A. died before his father, leaving no issue, George V. is dead, leaving no issue, Flora Victoria is dead without issue. Henry H. was born the 11th day of April, 1826. I have given all their names, ages and sexes, and the time of George B. Whitfield's death was the first day of April, 1839, the place Haynesville, Lowndes County, Alabama.

I do not know who the Sheriff delivered the negroes to at the Sheriff sale in 1828. They came back home the same day of the sale, to George B. Whitfield. I do not know that Whitfield held the possession of said negroes, after said sale, upon hire, but to the best of my knowledge the fact was oth-

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erwise, that he held by contract and agreement with Everett.

I have not stated anything in answer to the 19th direct interrogatory but what I know of my own knowledge, and I have not stated anything that was hearsay in answer to said interrogatory, except the overseer's name.

There is no person present when I am testifying and answering these interrogatories as well as the direct ones, but the Commissioners.

Defendant then read in evidence the deposition of Richard Blalock, taken by commission, who testified he knew Elizabeth Whitfield in her lifetime, and knew the other parties. I knew Elizabeth Whitfield, in Marlborough District, South Carolina, about twenty years before she left there, which was in 1823 or 1824. After she moved from there I never saw her again. I knew some negro slaves which she had when she lived in Marlborough, S. C., and which she carried away with her when she moved to Georgia. There was Stephen a boy, then two or three years old; Orange, a boy then over two years old; Plymouth, a boy then about on or two years old; Ailsey a woman then about forty years old; Jude, a girl, then some five or six years old; Jenny a girl, then 8 or 9 years old; Violet, age not remembered, (she has since died on James A. Everett's plantation in Houston County, Ga.); Hannah, a woman, then some 35 or 40 years old, she also died at Everett's; Dempsey, a boy, he is also dead; Binah, a girl, then some four or five years old, she is also dead. These are all I remember, at this time, of the negroes which Elizabeth Whitfield had while she lived in S. C. and when she left there. I have seen all of the negroes named above in the possession of Jas. A. Everett, in his lifetime, and of the defendants as executors since his death, except those which died before Everett, at least, I have seen them on Everett's plantation. I have seen some of the children of some of the above named negroes, also on the plantation of the said Everett, viz: George, a boy, about 18 years old; Tom,

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a boy about 17 years old; Mary, a girl, about 10 years old; Betsy, a girl, about 4 years old, children of Jinney; Mose, about 30 years old, the son of Hannah. I do not remember the names of any other children. These children named, are also on the plantation of Everett's estate. The present value of the above named negroes, I believe to be as follows; Stephen is worth \$1,000; Orange is worth \$800; Plymouth, \$900; Ailsey, worth nothing; Judge, worth \$700; Jinney, is worth \$800; Binah, was worth about the time she died, \$200; George, worth \$1,000; Mary, is worth \$500; Betsey, is worth \$300; Mose, is worth \$1,000. I do not know anything about the situation and ownership of the property at the death of Mrs. Elizabeth Whitfield—know nothing now that will benefit the plaintiff (at law.)

Mrs. Elizabeth Whitfield, has been dead about twenty-nine years—(date of answers is 18th March, 1854.) I understood she died in Eatonton, Georgia. She lived in Putnam county, as I understood. Elizabeth Whitfield, was the mother of Geo. B. Whitfield. When I knew her, she lived to herself, two or three years after the death of her husband, and then again about a year before she came to Georgia. After she came to Georgia, I heard she lived with her son, Geo. B. I can say positively that I saw the negroes named above, in my answer to the 3rd direct interrogatory, and which I suppose are the subject of this suit, in the sole and exclusive possession of Mrs. Elizabeth Whitfield, about a year before she left South Carolina. It was in Marlborough District, South Carolina, about the year 1823, or 1824; she then lived in Marlborough, S. C. She lived by herself on her plantation. Their names, ages and sexes, are as follows, to the best of my recollection. Stephen, a boy, about two or three years old; Orange, a boy, about two years old; Plymouth, a boy, 1 or 2 years old; Ailsey, a woman about 40 years old; Jude, a girl, age not remembered; Jinney, a girl, about 5 or 6 years old; Violet, then about 8 or 9 years old;

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Hannah, a woman, 35 or 40 years old; Binah, a girl, some 4 or 5 years old; I cannot state the month Elizabeth Whitfield died, but understood it was in 1825, at Eatonton, she died. I do not know that James A. Everett, bought at Sheriff's sale in 1826, 1827, 1828, or 1829, any negroes sold as the property of Geo. B. Whitfield, as I was not in this State during those years. I have heard, however, that he did buy some negroes but the number not recollect. I do not know whether George B. Whitfield, was in possession of said negroes before said sale or not. I do not know whether the negroes I have mentioned are some of the same or not. Everett has had the older set in possession, since I came to Georgia in 1831, and his possession has been peaceable and quiet, so far as I know. As to his possession before then, I don't know. He remained in possession till he died in 1847. I think Kendrick & Green, hold possession, as executors of James A. Everett. I do not know, from length of time, frailty of memory, age and infirmity, I am unable to testify as to the identification of the negroes. I have seen the principal part of the negroes occasionally, almost every week for the last four or five years, as I have been going to mill, and as they have passed my house going to work, &c. My age is about sixty-eight years. Can't say whether the Whitfields, Henry and William S., knew years ago that J. A. Everett, bought and paid for said negroes as George B. Whitfield's property. George was son of Elizabeth, and Wm. S. and Henry, sons of George. I do not know whether George B. Whitfield, in his lifetime had possession, and exercised control over said negroes at any time, except that two or three years before he came to Georgia, he and his, moved, lived, and there all worked together, but do not know that Elizabeth Whitfield lived to herself one year in S. C., her son George having moved to Georgia before she did, bringing his negroes, and leaving hers with her. How they lived after they came to Georgia, I do not know. I do not know any-

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thing more that will benefit defendants (at law, and complainants in equity.)

Defendant then read in evidence, the depositions of John C. Ashburn, who testified that he knows the parties, and did oversee the plantation and negroes for James A. Everett, in the year 1847, until December in 1852; the said Everett died as nearly as witness can remember on the 22nd of June, 1848. Witness says he knew on said plantation, in the possession of said Everett whilst in life, and in the possession and under the control and management of his executors after his death, certain negroes that were called the Whitfield negroes, that the said Everett got from Whitfield; that he knew in the possession of said Everett whilst in life, and on his plantation in the possession of his executors after the death of said Everett, the following negro slaves, that were known and designated on the plantation of said Everett, and his estate, from January, 1847, to December, 1852, as the Whitfield negroes, which were of the following ages and value, respectively, to-wit; Binah, 40 years old, worth \$500; Ailsey, 70 years old, worth nothing; Violet, 40 years old, died in 1851, previously to her last illness, worth \$600; Jude, 35 years old, worth \$650; Plymouth, 30 years old, worth \$1,100; Jake, 30 years old, worth \$900; Hannah, 50, worth \$100; Lydia, 65 years old, worth nothing, rather an expense; children of Binah, Floyd, 14 years old, worth \$900; Cato, 12 years old, \$850; Daniel, 6 years old, worth \$300; Violett's children, Harry, 18 years old, worth \$1000; Rose, died at about 16 years old, previous to her last illness, healthy, considered worth \$700; Louisa, 14 years old, worth \$800; Sarah, 12 years old, worth \$700 or 750; Lewis, 15 years old, worth \$950; Bias, 10 years old, worth \$500; Milly, 8 years old, worth \$300, and a boy, child of Violett, name not remembered, 6 years old, worth \$250. Children of Jude; Martha, 17 years old, worth \$750; Mima, 15 years old, worth \$750; Eliza, 13 years old, worth \$700; and Jim 10 years old, worth \$500. He knew Es-

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ther and her two children, Cynthia and Lizzie; Esther, 50 years old, worth \$100; her daughter Cynthia, 25 years old, worth \$800, and he thinks has several children; Lizzie, 22 or 23 years old, worth \$1,000. He does not know of his own knowledge, except from what he has heard Turner Everett say, that George B. Whitfield ever had in his possession any of the negroes named in the direct interrogatories. All he knows about the matters above testified to, is what he has heard Turner Everett, who was the agent and executor of James A. Everett, and others, to say in relation to the subject matter of inquiry, and it is therefore a matter of hearsay. It is usual and common when men buy land or negroes from A. or B., to call the land and negroes A. or B. land or negroes. He never knew any of the negroes named in the interrogatories in chief, to be in the possession of any person, other than the said James A. Everett, and his overseers in his lifetime, and in the possession of his executors and the overseers for the estate since the death of the said James A. Everett. He does not know how long the said James A. Everett had possession of said negroes previous to his death. The executors of said Everett, have had the possession of said negroes, so far as witness knows or believes, ever since the death of the said James A. Everett—does not know, but thinks that Everett and his executors have had the possession of said negroes some 15 or 25 years. He knows nothing more.

Defendant then read in evidence the depositions of Abner Burnam, one of the jurors—who testified from the prices fixed upon the negroes by the other witnesses.

Binah was worth annually, on an average, \$55 from 1828 Violett, \$65; Ailsey, 00; Jude, \$75; Plymouth, \$150; Hannah, \$40; Lydia, 00; Mose, from 15 years of age, \$125; Stephen, from 15 years of age, \$125; Orange, \$115; Jinney, \$100; George, \$100; Tom, \$100; Mary, \$40; Betsey, 00; Floyd, \$100; Cato, \$75; Dunn, 00; Harry, \$100; Rose, \$50; Louisa, \$40; Sarah, \$40; Lewis, \$100; Bias, \$50; Milly,

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00 ; Boy Anderson, 00 ; Martha, 60 or 70, \$65 ; Mima, \$75 ; Eliza, \$40 ; Jim, \$50.

Mr. Burnam also testified, he considered young negroes able to earn their vituals and clothes before 14 or 15 years old, but not more, and that it is worth two hundred and sixty dollars a head to raise young negroes till they would earn their support; that he had known some of the names of the negroes in controversy, and worked with them on the road as far back as 1829 or 1830; they were then in James A. Everett's possession. Here defendant closed.

Complainant then read in rebuttal, so much of David Emanuel's testimony as showed the following: "that a negro man by the name of Mose, was owned and claimed by George B. Whitfield in South Carolina."

Complainant then introduced Mr. _____ Thompson, who testified that Harry, Lewis, Louisa, Rose, Bias, Sarah and Milly, are Violett's children; that Martha, Mima, Elizabeth and Jim, are Jude's children; that Floyd, Cato and Daniel, are Binah's children; that Daniel died before witness went there; that Rose and Charity are also dead.

Here the case rested, and after argument had, his honor Judge Lamar, presiding, charged the Jury as follows:

"The Counsel on both sides have in writing agreed to submit to the Jury, both the common law and equity cases together, for your adjudication. I give you the law applicable to the issue to be, that twenty years is an equitable bar, provided no legal disabilities exist so as to prevent a party from asserting his rights, but according to the statute of limitations at law, time does not run until administration is granted on an intestate's estate. But the rule which controls the question, in equity, is different as to the running of time, and therefore of its commencement. If, then, George B. Whitfield, died in 1839, and Everett acquired this property in 1828, no equitable bar existed against him, George B. Whitfield, during his life, as twenty years had not elapsed from the possession of the property by Everett, before Whit-

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field's death. And if Henry H. Whitfield the administrator and his brothers and sisters, were minors at the time of the death of George B. Whitfield, then this equitable bar ceased to run against them during their respective minorities, and such of them as were not of the age of twenty-one, until they arrived at that age. Being under a legal disability to assert their rights, equity would not bar them. If, however, from the time of the removal of this disability a sufficient time had elapsed which added to the period of time which had run against their ancestor, Geo. B. Whitfield, before his death, would make the period of 20 years, then an equitable bar would exist, and would furnish grounds for relief, provided, that you should believe from the evidence that no fraud existed on the part of Everett, and that his purchase was *bona fide*. The Court goes even farther than the counsel for the complainants insist on, as their remedial rights if they solely rely on an equitable bar, and charge you that if Mrs. Whitfield died, leaving her estate as stated, and that if Geo. B. Whitfield, her sole heir, took possession of it as such, that he had an equitable right in it, although the legal title might at the same time exist in the estate of his mother, or in such person as might take out administration on the same—that Everett at any time during his life, could have enjoined Geo. B. Whitfield, either in his own right, or as administrator on his mother's estate, from attempting to recover said slaves, provided that George B. Whitfield knew of the sale, consented to it, and the appropriation of the money to his own use, and acquiesced in it, because it would be unjust and inequitable for him to have received the benefits of the sale thereby made, and then under color of his administration to recover the property back, and the Court further holds his heirs, or distributees, would be subject to the same rule, provided you should believe that there was no fraud committed by Everett in the sale or acquisition of the negroes.

But if from the evidence, you should believe the sale made by the Sheriff to Everett, was fraudulent and not "*bona fide*,"

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and that Everett participated in that fraud, then neither he during his life, or his executors after his death, can have relief in equity, but is remitted back to their legal rights, whatever they may be, for it is a maxim, that he who comes into a Court of conscience, or this sacred temple invoking equity, must come in with clean hands and untainted with fraud. Equity says to the fraudulent, as the tree falls so it must lie—as you make your bed, so you must lie down in it. The Court intimates no opinion as to whether fraud has or has not been proven in the case, for this is the peculiar province of the jury—looking to all the facts proven or given in evidence by both parties. Fraud must be proven and not presumed, but it may be proven from circumstances, upon the effects of which you are the exclusive judges. The defendant's counsel asks me to instruct you, that when vendor or defendant in execution, after a judicial sale remain in possession of the property sold, it is evidence of fraud. I charge you that it is a badge of fraud. But this possession may be explained, as it only affords a presumption of fraud. If you find for the executors of Everett, you will decree, that the common law action be perpetually enjoined. If you find for the administrator of Elizabeth Whitfield, you will decree that the executor of Everett pay the value of the negroes, from the time which you believe, from the evidence, to have been converted by Everett, belonging to the estate of Elizabeth Whitfield, and the hire from the time of the conversion of the property by Everett. The negroes, which were in life at the time of the demand, will be included in your estimate of their value, although they may have died since, but not those which died prior thereto.

To which charges the complainants then excepted, and now here except and assign the same as error.

The jury retired and returned a decretal verdict for the defendant in the Bill, and plaintiff at law for the sum of thirty-seven thousand three hundred and twenty-six dollars.

Counsel for complainants having duly and regularly filed

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in the Clerk's office a brief of evidence agreed on by counsel on both sides moved the Court, on Saturday morning, the sixth day of November, 1858, during the sitting of said Court, having served the defendant's Solicitor with the grounds of the motion for a new trial on the following grounds:

1st. Because defendant could not recover, in this bill, nor was he entitled to a decree on complainants' bill, which was merely defensive, and to entitle defendant to a recovery, a cross bill was necessary, and the Court erred, when complainant's counsel urged this objection on the trials, in ruling otherwise.

2d. Because the Court erred in charging the jury, "that twenty years is an equitable bar, provided no legal disabilities exist so as to prevent a party from asserting his rights, but according to the statute of limitations at law, time does not run till administration is granted on the intestate's estate, but the rule which controls the question in equity is different, as to running of time, and the time of its commencement. If then George B. Whitfield died in 1839, and Everett acquired this property in 1828, no equitable bar existed against George B. Whitfield during his life, and if Henry H. Whitfield, the administrator, and his brothers and sisters were minors at the time of the death of the said George B. Whitfield, then his equitable bar ceased to run against them during their respective minorities, or such of them as were not of the age of twenty-one years, until they arrived at that age, being under a legal disability to assert their rights equity would not bar them.

3d. The Court erred in further charging the jury, "If, however, from the time of the removal of the disability, a sufficient time had elapsed, which added to the period of time which had run against their ancestor, George B. Whitfield before his death, would make the period of twenty years then an equitable bar would exist and would furnish grounds for relief, provided you should believe no fraud existed on the part of Everett, and that his purchase was *bona fide*,"

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there being no evidence of fraud, and the said charge being otherwise erroneous.

4th. The Court also, erred in that part of its charge, modifying the equitable bar of George B. Whitfield and his heirs, to twenty years. Also, qualifying so as to say, "provided there was no fraud on the part of Everett," there being no fraud proven.

5th. The Court also erred in charging that, "If from the evidence, the sale to Everett made by the Sheriff, was fraudulent and not *bona fide*, and that Everett participated in the fraud, then, neither he, during his life time, nor his executors after his death, can have relief in equity, but is remitted back to their legal rights whatever they may be, for it is a maxim that he who ever comes into equity, must come with clean hands, and untainted with fraud."

6th. The Court erred in submitting the question of fraud to the jury in this case.

7th. Because the jury found contrary to law and that portion of the charges of the Court most favorable to complainants.

8th. Because the jury found contrary to the evidence, the weight of evidence and against evidence.

9th. Because the jury found contrary to the justice and equity of the case.

10th. Because the jury found contrary to and without evidence.

And after argument had on said motion for new trial, the Court overruled the motion on each and every ground taken therein, to which rulings of the Court, overruling the motion for new trial, complainants except and assign the same as error, as well also, as the various other rulings of the Court, and as the facts aforesaid do not appear of record—now come the plaintiffs in error, by their counsel James J. Scarborough and George R. Hunter, on this — day of — in the year of our Lord eighteen hundred and fifty-eight, and within thirty days from the adjournment of the said Court, and

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tender this their bill of exceptions, and pray that the same may be certified according to the statute in such case made and provided.

JAS. J. SCARBOROUGH; GEO. R. HUNTER; POE & GRIER, for plaintiffs in error.

S. T. BAILY; and E. A. NISBET, *contra*.

By the Court.—BENNING, J. delivering the opinion.

The first questions are on the charge of the Court.

A part of the charge of the Court, was to this effect—that, the period of the adverse possession of negroes, necessary to bar the equitable title to them, of next of kin, is twenty years; but that, if, before the lapse of the twenty years, the title comes to persons who are minors, the time during which, they remain minors, is not counted; and that, consequently, the period in that case, is more than twenty years, viz: is the term from the accrual of the title, to its coming to the minors, plus the subsequent term during which, they remain minors; plus such a term afterwards, as shall be sufficient, when added to the first term, to make twenty years. The latter portion of this charge, was excepted to—but we think, that it was not erroneous.

Equity in general, follows the law in respect to the statute of limitations; and the law says, that the “statute of limitations, when it has commenced running, shall not so operate as to defeat the interest acquired by idiots, lunatics, or infants, after its commencement, but the operation of said statute shall cease until the disability or disabilities of such persons are removed, or from the time of the arrival of such infant to the age of twenty-one years.” *Stat. of 1817, Pr. Dig. 578.* We see nothing in this case to take the case out of the general rule.

The exception to the former part of this charge; viz, to the part stating twenty years as the period of the “equitable bar.”

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That is, as the period that would have to elapse, before an administration would be presumed, was hardly insisted on. Indeed, the bill itself says, that there never was any administration, until that by Henry H. Whitfield, consequently one could not be presumed. And even if this were not so, we incline to think that the charge would still be right.

Another part of the charge, was, in substance, that if Geo. B. Whitfield was the sole heir of Mrs. E. Whitfield, his mother, he had an equitable right to take possession of the negroes of her estate; and if they were sold under *fi. fas.* against him, and sold with his consent, and bought by Everett, the title to them acquired by Everett, would be good against, not only Geo. B. Whitfield and his heirs, but also against an administrator of his mother—provided, there was “no fraud committed by Everett, in the sale or acquisition of the negroes.” Exception was taken to the proviso in this part of the charge; and the ground assumed for the exception, was, that there was nothing in the evidence to authorize the Court, to insert such a proviso. The question therefore, is, whether that ground was true—whether there was any thing in the evidence, tending to show fraud, as the means by which, Everett acquired the negroes,—fraud on George B. Whitfield?

We may assume that fraud was the means by which, Everett acquired the negroes, if the manner by which he acquired them, was some such manner as the following, namely—He and Whitfield agreed, that the negroes of Whitfield, thirty-two in number, should be sold in “a lump,” under the *fi. fas.* against Whitfield, although the negroes were worth much more than the amount due on the *fi. fas.*; that he, Everett, should bid them in, satisfy the *fi. fas.*, and, to secure himself, receive an absolute bill of sale for the negroes, from the Sheriff, and, at a certain time afterwards, take possession of the negroes and keep such possession until his advance was repaid to him, by the labor of the negroes or otherwise. Accordingly, the thirty-two negroes were so sold in a lump.

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Everett bid them in; satisfied the *f. fas.*; received an absolute bill of sale for them from the Sheriff; and, at the end of the year, took possession of them. The labor of the negroes was of sufficient value to repay Everett's advance, by the end of a certain number of years afterwards, say ten or twelve. When this time arrived, Everett, instead of delivering back the negroes to Whitfield, set up an absolute claim to them, and commenced holding them, adversely to Whitfield. I say, that if the way by which, Everett acquired the negroes, was some such way as this, we may assume, that he acquired them by fraud. His refusal or failure to carry out the bargain, by a redelivery of the negroes, would be evidence sufficient to authorize the inference of an original fraudulent intent in him.

Now if there was any thing in the evidence, going to show, that this was the kind of way in which, Everett acquired the negroes in question—they being a part of the thirty-two—then, it is not true, as the exception assumes it to be, that there is nothing in the evidence, to warrant this charge as to fraud.

Was there, then, any thing in the evidence, going to show, that this hypothetical way was the real way by which Everett acquired the negroes? We think that there was.

First, it is in the evidence, that the whole thirty-two negroes were sold "in a lump," under a *f. fa.* against Whitfield; that they were bought by Everett, at \$6,791, not half their value; that Whitfield was present at the sale; that the negroes, after the sale, returned into Whitfield's possession, and remained in his possession until the end of the year; and that at the end of the year, possession of them was taken by Everett, who kept it until his death in 1847, or 1848, and, that possession of them has continued, ever since his death in his executors; and, that Whitfield died in 1839, worn out by drink—a habit which was on him at and before the sale to Everett.

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Now from these facts alone, we are authorized, we are required, to presume, that there existed, between Everett and Whitfield, an arrangement of some sort by which, they and the Sheriff were acting. Had it been merely the law by which, all parties were acting, the course of events would have been quite different. The Sheriff would not have dared to put up to sale, the thirty-two negroes "in a lump"—and if he had done so, Whitfield would, probably, have protested against it; nor would he have delivered the negroes back to Whitfield; nor would Everett have acquiesced in his doing so, if he had attempted it, but he would have delivered them to Everett, the purchaser, and he in all probability would have carried them to his own home, immediately, and not have waited until the end of the year, before he did so. These facts, then, of themselves, require us to presume, that there existed some arrangement between Everett and Whitfield by which, Everett obtained the negroes. I may go further,—they require us to presume, that that arrangement was one by which, Everett was to acquire no more than a partial interest in the negroes—an interest inclusive of the right to have possession of the negroes and to receive the proceeds of their labor, in satisfaction of, or as security for, the money advanced by him, for Whitfield. And to presume the arrangement to have been such a one as this, is to presume it to have been identical, in substance, with the arrangement assumed in hypothesis.

Everett failed to redeliver the negroes, at the time at which, the proceeds of their labor, amounted to a sufficient sum to pay off his advance; but still kept them as his own. Such conduct in him, supposing the arrangement to have been as aforesaid, was sufficient to warrant the inference, that he was actuated, from the beginning, by a fraudulent purpose.

Thus then, these facts being in the evidence, there was enough in it, as we think, to justify the charge about fraud.

Secondly: But there is more in the evidence. West, who was Everett's overseer, the year in which the Sheriff's sale

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took place, says, that Whitfield "wanted Everett to take up the executions, and take a mortgage on his negroes," that Whitfield urged "Everett to take up said executions, and take control of them." "He heard nothing about selling property." The witness is speaking of a conversation in his presence, between Whitfield and Everett.

This goes to show, at least, what Whitfield's wishes were, viz: that Everett should pay his debts, and take his negroes as security for reimbursement. And if these were his wishes, we may safely say, that Everett's purchase of the negroes in "a lump," at half price or less, was not an absolute purchase; for an absolute purchase would not have answered Whitfield's wishes, and he had it in his power, to prevent a purchase on any such terms—he had it in his power, to require the Sheriff to sell the negroes to the best advantage—and, therefore, to require him, not to sell them in "a lump." We are, then, at liberty to infer, that Everett acceded to Whitfield's wishes.

Thirdly ; the answer to the bill, sets up an understanding between Everett and Whitfield, of which, we may say, in general terms, that it was an understanding by which, Everett was to pay off the *f. f. s. as.* against Whitfield, and have the negroes as a security for his reimbursement. It is true, that the answer in this particular is put, on information and belief—but then the bill calls for an answer on information and belief, and the answer in this respect, merely responds to the call—for it is responsive to the allegations in the bill, as to the manner in which, Everett acquired the possession of the negroes.

We think, then, that there *was* in the evidence, a number of things going to show, that the mode in which Everett acquired the negroes, was the hypothetical mode aforesaid, or some similar mode; and consequently, we think, that there was matter in the evidence, to warrant the charge of the Court as to fraud.

Another part of the charge, and a consequence of the part

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last noticed, was, that if Everett acquired the slaves by a fraud on Whitfield, equity would not aid him or his representatives, to hold them, against Whitfield or his representatives. This was the substance. This part was not, I believe, questioned. Certainly, it ought not to be, as we think.

Another part of the charge, was in these words. "The Court intimates no opinion as to whether fraud has or has not been proven in the case, for this is the peculiar province of the jury—looking to all the facts proven or given in evidence, by both parties. Fraud must be proven and not presumed, but it may be proven from circumstances upon the effects of which, you are the exclusive judges." This part was excepted to, as "submitting the question of fraud to the jury." But as we understand the part, it merely submits the question of the *weight* of the "circumstances," to the jury. True, the word used, is "effects." "Upon the effects of which" [circumstances] "you are to be the exclusive judges." This is no more than saying, weigh the circumstantial evidence—for to do that is your exclusive province.

Another part of the charge, was in these words. "The defendant's counsel asks me to instruct you, that where a vendor or defendant in execution, after a judicial sale, remains in possession of the property sold, it is evidence of fraud. I charge you that it is a badge of fraud." Exception was taken to this part of the charge, and the ground on which the exception was put, was, not that the proposition of the Court was not true, but that there was nothing in the case to authorize the Court to state the proposition to the jury; that there was not in the case, any matter out of which, could be made a question of defrauding creditors of Mrs. Whitfield, by what took place between Geo. B. Whitfield and Everett.

But, in strictness, this ground is not true. It was in proof, that old Mrs. Whitfield's estate was still in debt a small sum, \$50, to one Blalock, who had been her overseer. Geo. B. Whitfield was her only heir, and it was a possible thing, that

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he, by the arrangement with Everett, intended to defeat the collection of this debt. If he did so intend, that of itself made the arrangement fraudulent as to Blalock; and Blalock had the right to insist on it, as a ground of setting aside the arrangement. True, there may have been other and sufficient grounds also open to him for setting aside that arrangement, but a man has the right to rely on all his grounds of attack or defence. And Henry H. Whitfield, the party suing, was the administrator of Mrs. Whitfield, and as such, he both represented Blalock, her creditor, and had the *legal* title to the negroes. Geo. H. Whitfield not having been able to pass more than the equitable title to them, to Everett. Therefore, it was competent for Henry H. Whitfield, to assert this ground for Blalock.

So much for the question on the charge of the Court.

The motion for a new trial repeated the exceptions to the charge, and added to them some others all of which latter, may be reduced to this, that the verdict was contrary to the evidence in two particulars, one, that the evidence showed the action, barred by lapse of time—the other, that the evidence showed the verdict, much too large.

As to the first of these two particulars. If it be true, that Everett acquired the negroes from Whitfield, under an arrangement by which, he was to pay off the *f. s. f. s.* against Whitfield, and take possession of the negroes, and hold them, as security for his reimbursement, until their accumulated labor or hire, should be equal to the amount advanced by him, then, time, whether at law, or in equity, did not begin to run against Whitfield, until the accumulated hire and labor had become equal to the amount advanced by Everett, with interest, and, perhaps, not then, unless Everett then notified Whitfield, that he claimed the negroes as exclusively his own. When this time would come, would of course depend on two things, the amount of Everett's advance, and the annual amount of the labor or hire of the negroes. The evidence shows, that Everett's advance amounted to, at least

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\$6,791, for the Sheriff's return says so, and also says, that this sum was applied, (to older *f. f. s.*)

The advance may have amounted to more—to a sufficient sum to pay off all the *f. f. s.* against Whitfield; and it must have done so, if the arrangement between the two men was the one above supposed, and if it was carried out faithfully, by Everett. It is at least certain from the evidence, that the sum advanced by Everett, was a large sum. We may assume, therefore, I think, that it would take some ten or twelve years, for the annual hire of the negroes to pay it off with the interest. Then we may say, that the advance was not paid off till say, 1839, or 1840. The suit in trover was commenced on the 30th of September, 1853—that is, within less than twenty years, from the probable time at which, the hire paid off the advance, and, therefore, within twenty years from the first moment at which, time could commence running against Whitfield. The suit, then, was not barred by time, if there was such an arrangement, as the one supposed, between Everett and Whitfield. And we think, as has been already disclosed, that there was considerable evidence, going to show, that such an arrangement as that did exist between them.

Consequently, we cannot say, that we think it true, that the evidence showed the verdict, barred by lapse of time.

Is it true, that the evidence showed the verdict, much too large?

The verdict was large, but, on a careful examination of the evidence, we think, that it was not too large. If we take the value of the living negroes sued for, exclusive of the value of the dead ones, Violet, Rose, Binah and Hannah, and add to this value so taken the hire of the negroes, inclusive of the hire of the dead ones up to their death, and from the sum deduct the expense of raising the young negroes, we shall have about the amount of the verdict. And ought not Everett's executors to be satisfied with this way of coming at what should be the amount of the verdict? We think they

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ought; for it is by no means clear, that they are not liable for the value of the dead negroes.

It is true that in this mode of calculation, they get no credit for the amount advanced by Everett, for Whitfield. But then on the other hand, the suit is but for a part, and much the smaller part, of the negroes received by Everett; and, in the absence of proof from his side, it is fair to presume, that this larger part of the negroes, which he or his representatives still retain, is sufficient to balance that amount.

Upon the whole then, we cannot say, that any of the exceptions appear to us, to be sufficient.

Judgment affirmed.

27	167
105	418
27	167
109	645

JOHN HENDRICK, plaintiff in error, vs. RICHARD DAVIS, Sheriff, for the use, &c., defendant in error.

- [1.] That part of the statute pointing out the duty of the Sheriff, in making sale of property executed by him, and declaring that he shall advertise the sale in three of the most public places of the county, is directory to the Sheriff only, and if he omit to do it, such omission does not vitiate the sale; but any person injured by this neglect of duty, has a remedy against him.
- [2.] A deed exhibited at a Sheriff's sale, said to be a conveyance of the property sold, but which was not read, nor examined by the person who bid off the property, is no evidence for him in an action for refusing to comply with the terms of the sale.
- [3.] If the error assigned be, that the Court refused to admit in evidence representations and statements made by the Sheriff, at his sale of property, the record must show what those representations and statements were, or this Court cannot pass upon them.
- [4.] To hold a person who refused to comply with the terms of Sheriff's sale, liable for the difference between the price at which he bid off the property, and the price at which it was subsequently sold, the same property must have been resold, and resold as the property of the identical parties as whose property it had been bid off by him.

Hendrick vs. Davis, Sheriff.

Assumpsit, from Randolph county. Tried before Judge KIDDoo, at November Term, 1858.

This was an action by Richard Davis, Sheriff, for the use of Lodwick Lard, against John Hendrick, to recover eight hundred and ten dollars, being the difference between a first sale of Lard's property made by the Sheriff, and bid off by Hendrick, and a second sale thereof, Hendrick failing and refusing to comply with his purchase, and said property resold at his risk.

Under a *fi. fa.*, at the suit of E. H. Martin vs. Lodwick Lard and Masten D. Hendrick, makers, and Thomas L. Douglass and William T. Callier, endorsers, the Sheriff of Randolph county made a levy, and entered the same on the *fi. fa.*, in the following words, to-wit:

"GEORGIA, RANDOLPH COUNTY.

Levied this *fi. fa.* on one-third interest of steam mills and fixtures, together with one-third interest of eleven hundred acres of land immediately attached, being the interest formerly owned by Thomas L. Douglass; also $\frac{1}{2}$ interest of $\frac{1}{2}$ lot of land No. 118, and $\frac{1}{2}$ interest of lot of land lying east of the mills' lands, cornering on the Hugh McKinnon lot of land; also $\frac{1}{2}$ saw timber on 147, $\frac{1}{2}$ saw timber on lot No. 112, $\frac{1}{2}$ saw timber of lot of land 79, all in the 6th district, said county; levied on as the property of *defendants*. Pointed out by M. D. Hendrick and L. E. Lard. Oct. 1st, 1856.

(Signed)

E. VARNER, *D. Sh'ff."*

The Sheriff advertised his levy in the Columbus Times, and described the property as belonging to *L. E. Lard and Masten D. Hendrick*.

The property was put up to the highest bidder, and bid off by John Hendrick, at the price of \$1,810. Afterwards, he was tendered a deed by the Sheriff, in which the land was described as the property of *Lard* only; the purchaser refused to pay his bid, or to accept the deed; the property was

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re-advertised to be resold at the purchaser's risk, and was described in the advertisement, and sold as the property of *Lodwick E. Lard*. At the second sale, John McK. Gunn became the purchaser at \$1,000. And this action is brought against John Hendrick, to recover the difference between the first and second sale.

Upon the testimony and charge of the Court, the jury found for the plaintiff \$810 00, and the defendant tenders his bill of exceptions, assigning the following errors:

1st. In the refusal by the Court to allow defendant to ask the Deputy Sheriff, if the sale was advertised at three of the most public places in the county.

2d. In refusing to allow defendant to introduce in evidence the deed of Thomas L. Douglass, which was held up at the time of the sale by the Sheriff, and which was announced to be a deed to the land then selling.

3d. In refusing to allow defendant to prove the representations and statements made by the Sheriff about the property, and what he was selling.

4th. In not withdrawing, on motion by defendant's counsel, from the jury, the levy on the execution, and in holding that said levy authorized the Sheriff to advertise and sell the one-third interest of each defendant separately, in and to said property.

5th. In not allowing defendant to prove that said sale had not been advertised at three of the most public places in the county.

PERKINS; E. H. BEALL, for plaintiff in error.

HOOD & ROBINSON, contra.

By the Court.—McDONALD J. delivering the opinion.

The defendant in the Court below, who is the plaintiff in error here, was sued by the Sheriff, for the use of Lodwick

Hendrick vs. Davis, Sheriff.

E. Lard, to recover the difference between the price at which the defendant had bid off certain property at Sheriff's sale, he having refused to comply with the terms of sale when required to do so, and the price at which the property was afterwards sold. The suit was brought under the Act of 1831. Cobb, 513.

[1.] On the trial, the plaintiff in the Court below introduced the Deputy Sheriff as a witness. The counsel for defendant proposed to ask him if the land had been advertised in three of the most public places in the county. The question was objected to, and the objection sustained, and error is assigned on that decision. It is made the duty of the Sheriff to advertise the sales of property levied on by him, in three of the most public places in the county. This is merely directory to the Sheriff, and his failure to do it does not vitiate the sale. But if the omission of this duty should result in injury to any one, the injured person would no doubt have an action against him to recover damages commensurate with the injury sustained.

[2.] We do not see the relevancy of the deed of Douglass, offered in evidence, to the issue between the parties. A deed was exhibited at the time of the sale, said to be a deed to the property that was selling. But that had nothing to do with the matter before the Court. The defendant did not examine it, and he cannot claim to have been misled or prejudiced in any way by its exhibition. He was content to purchase by the levy and advertisement. The Court very properly rejected the deed.

[3.] In regard to the third assignment of error, I will remark that it no where appears in the record, what had been the representations and statements made by the Sheriff about the property, and what he was selling, and this Court has therefore no means of determining whether the Court erred in ruling them out. Error is not to be presumed.

The defendant's counsel moved to withdraw from the jury, the levy upon the *ft. fa.* in favor of E. H. Martin vs. L. E.

Hendrick vs. Davis, Sheriff.

Lard and M. D. Hendrick, makers, and Thomas Douglass and William T. Callier, endorsers, deciding that said levy on said *f. fa.* authorized the Sheriff to make sale of the one-third interest of either of the said defendants separately, in and to the property levied on. Error is assigned on this decision. In determining this assignment of error, we refer to the principles upon which the plaintiff's suit depends. The plaintiff in error had purchased, at the Sheriff's sale, the interest of *two* of the defendants in the third part of the property sold. He bid it off at \$1,810. He refused to comply with the terms. The property was advertised subsequently, and sold for \$1,000, as the property of Lodwick E. Lard only. For Hendrick to be liable, the same property must have been resold, and resold as the property of the identical defendants as whose property it had been bid off by him. If it had been offered the second time as the property of both defendants, and especially if each owned a third, who can say that the property would not have sold for the amount of Hendrick's bid? The decision of the Court must be construed to mean, that notwithstanding the Sheriff offered for sale the interest of two defendants, and it was bid off by Hendrick, he, not having complied with the terms of sale, must be held liable for the difference between his bid and the price at which it was sold at the second sale as the property of one defendant only, inasmuch as the Sheriff was authorized by the levy to make sale of the one-third interest of either of the defendants separately, in the property levied on. The question in the case was not on the authority of the Sheriff to sell, but upon the liability of the defendant below to respond for the difference between his bid and the price of the second sale, when he had bid off the interest of two of the defendants, and the subsequent sale was of the interest of one only. The decision was wrong in reference to the facts of this case, and the law of the defendant's liability.

A matter appears in the record, but on which no point seems to have been made in the Court below, and there has

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been no allusion to it here. The plaintiff in error, as repeatedly already remarked, bid off the interest of two of the defendants in the property offered for sale; when the Sheriff demanded of him a compliance with the terms of sale, he tendered a deed conveying the interest of one of them only.

We reverse the judgment on the fourth assignment of error appearing in the record, for the reasons stated.

Judgment reversed.

**WILLIAM R. HARGROVE, plaintiff in error, vs. WEBB & ALLEN,
defendants in error.**

- [1.] A dilatory plea must be filed at the appearance Term of the cause.
[2.] The guardian of a free person of color may ratify his contract, and a suit upon such contract by the guardian is sufficient evidence of such ratification.

Complaint, from Miller county. Decision by Judge Kidoo, at October Term, 1858.

This was complaint by Webb & Allen, on an account, against William R. Hargrove.

Upon the case being called for trial, on the appeal, defendant moved an amendment to his plea, to the effect that Allen G. Webb, one of the plaintiffs, was a free person of color, and not entitled to sue, nor to make contracts without the written permission of a guardian. Plaintiffs' counsel objected to the amendment. The Court sustained the objection, and refused to allow the proposed amendment, and defendant excepted.

The case was submitted to the jury, under the evidence and charge of the Court, who found for plaintiffs fifty-four dollars and fifty-six cents.

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Defendant moved for a new trial on the grounds:

1st. Because the Court erred in refusing to allow the amendment to the defendant's plea.

2d. Because the verdict was contrary to law and evidence, and the charge of the Court.

The Court refused the motion for new trial, and defendant excepted.

LAW & SIMS, for plaintiff in error.

S. W. PARKER, represented by POW, *contra*.

By the Court.—McDONALD, J. delivering the opinion.

The defendant appeared and pleaded the general issue at the appearance Term of the cause. On the appeal, the defendant proposed to amend his plea, by filing a dilatory plea as to one of the plaintiffs, viz: his disability to sue; and to amend it further by pleading to the contract, that it was void, because made by a free person of color, having one-eighth of African blood in his veins, who had not the written permission of his guardian to make said contract. The Court refused to allow the amendment, and the defendant excepted.

[1.] A dilatory plea must be filed at the first Term of the Court, and leave to file it on the appeal ought not to have been allowed; and if the party had filed it as a matter of right under the statute, the Court ought to have ordered it to be stricken out, on motion, as inadmissible. We pass no judgment on the question whether the plea could have been sustained, if it had been filed in time.

[2.] In support of the second plea, that the contract was void, the plaintiff relies on the Act of 1833, which declares that it shall not be lawful for any person to give credit to any free person of color, but on a written order of a guardian. *Cobb, 1005.* This Act was for the *protection* of free persons of color from the designs of men, by whose arts and persuasions, they might be seduced into contracts of waste and ex-

Howard vs. Behn & Foster.

travagance. It was intended to throw about them and their property, the guard of the better poised judgment of a discreet guardian. A free person of color, without property, would scarcely obtain credit on the written order of his guardian.

This law, intended for the benefit of that class of persons must not be made an instrument or engine of mischief to them. It cannot be construed to mean, that, if they extend to white persons credit, and let their services or property go in that way, even without consultation with their guardian, the debts thus contracted are not collectible. The guardian may ratify the contract, and a suit upon it is always sufficient evidence of ratification. There is no principle in the case of *Bryan vs. Walton*, 14th Georgia, 196, which controverts what we now rule.

There is abundant proof to sustain the verdict of the jury, if the witness is to be credited, which we presume the plaintiff in error will not dispute.

Judgment affirmed.

JOHN T. HOWARD, plaintiff in error, vs. BEHN & FOSTER, defendants in error.

If the factor pays the draft of the planter, upon the faith of produce which he never receives, he is entitled to recover the amount in an action for so much cash paid for his use; and on the balance due on the account between the cash received and the cash advanced for the defendant, the plaintiff is entitled to interest.

Complaint, from Randolph county. Tried before Judge KIDDoo, at November Term, 1858.

Howard vs. Behn & Foster.

This was an action, under the Jones Forms, by Behn & Foster against John T. Howard, on account.

The following bill of particulars was filed with the declaration, viz :

**MR. JOHN T. HOWARD,
IN ACT. WITH BEHN & FOSTER.**

1854.

A bill of bagging, rope, twine, set out by
items, amounting to - - - - - \$451 38

1855. Jan. 15. Cash paid his draft to our own or-
order, and endorsed by McBain &
King, - - - - - 2,607 37
Com's on advancing \$1,952 06 at 2½, 48 80

3,107 55

1854. CREDIT.

Dec. 23. By sales rendered 40 B. Cotton, \$1,090 49

1855.

Jan. 30.	"	"	29	"	806 08	-	1,896 57
						<hr/>	\$1,210 93

Plaintiff amended the declaration by adding the following copy draft to the bill of particulars, viz :

"\$2,607 37-100. AMERICUS, Ga., 13 Nov., 1854.

Sixty days after date pay to the order of myself, at the Marine Bank of Ga., in Savannah, Twenty-Six Hundred and Seven 37-100 Dollars, value received, and charge the same to account of

JOHN T. HOWARD.

To Messrs. BEHN & FOSTER, Savannah, Ga.

Endorsed "pay G. M. Taylor or order.

JOHN T. HOWARD.

" pay W. P. Hunter, Esq., Ass't Cashier, or order.

G. M. TAYLOR.

And written across the face "McBain & King," "Accepted,"
Behn & Foster."

Howard vs. Behn & Foster.

To which declaration as amended defendant demurred on the grounds:

1st. That there is a misjoinder of causes of action, account and draft.

2d. That account is not the proper remedy or form of action.

3d. That the amendment was improper unless accompanied by an allegation that the acceptors were accommodation acceptors.

4th. That no action in the form of complaint, under the Act of 1847, can be sustained by the acceptors against the drawers of a bill, and especially if the declaration contained no allegation that the acceptance was for accommodation, or *supra protest*.

The Court overruled the demurrer, and defendant excepted.

Plaintiff then submitted his proof. Defendant introduced no testimony.

1st. The Court charged the jury, that if defendant shipped his cotton to plaintiffs and drew on them—the proceeds of the cotton to go to the payment of the draft—then the plaintiff, in the absence of instructions, had the right to sell the cotton at any time, provided the sale was *bona fide*, and the defendant would be bound by the sale.

2d. The Court further charged, that the usual custom of the country is for the planter to ship his cotton to a commission merchant and draw on him; and in such cases the acceptors are mere accommodation acceptors, and if the jury believe such to be the fact here, then the plaintiffs are mere accommodation acceptors, and as such, entitled to recover.

3d. The Court further charged, that if the plaintiffs are entitled to recover, then they are entitled to interest from the time of the payment of the draft.

To which charges defendant excepted.

The jury found for the plaintiffs \$1,210 93, with interest from the 15th January, 1855.

Howard vs. Behn & Foster.

Whereupon, defendant tenders his bill of exceptions, and assigns as error:

- 1st. The decision of the Court overruling the demurrer.
- 2d. The decisions overruling all defendants' objections to the depositions of Janes, Bemis, Prescott, Price, Long and Battersby.

- 3d. The charge above given.

HOOD & ROBINSON, for plaintiff in error.

DOUGLASS & DOUGLASS; and PERKINS, *contra*.

By the Court.—LUMPKIN J. delivering the opinion.

This is really an action for an account, in which is an item of \$2,607 37, paid by the plaintiff for the defendant, on a draft. It is for the plaintiff to prove that he paid this money for the defendant, and that under the circumstances, he is entitled to recover it back. The amendment was unnecessary. The complaint was good without it. The amendment did not vitiate it. The complaint is not on the draft. It could not be, of course, at the instance of the acceptors against the drawers. It must be a monied action, and no other sort.

If, then, the writ was good, the Court was right for admitting the proof under it. The objections to the testimony were founded on a misconception of the nature of the suit. Nor do we see any thing wrong as to the proof of the custom of merchants, in relation to certain matters.

Interest was due on the cash balance, overpaid by the plaintiffs. The account, except as to the amount paid on the draft, was not disputed by the defendant, when presented. Whatever the cotton lacked of refunding the cash paid on the draft, should bear interest.

The real trouble in this case is, the *bona fides* of the sale of defendant's cotton; and that the Court submitted to the jury.

Judgment affirmed.

Bowman, ex'or, vs. Long, guard'n.

27 178
106 497**ROBERT BOWMAN, executor, plaintiff in error, vs. JESSE L. LONG, guardian, defendant in error.**

- [1.] If the guardian of a legatee, whose legacy is limited over in remainder, if he should die before he attains the age of twenty-one years, sues for the recovery of the legacy, the defendant may amend his answer before the hearing, and allege the embarrassed circumstances, and perhaps, insolvency of the guardian, and ask the Court that he may be required to enter into bond for the security of the remaindermen.
- [2.] If a cross bill should be necessary, the Court of the county in which the original suit is pending, has jurisdiction of it.

In Equity, from Bibb county. Decision by Judge LAMAR,
at December Term, 1858.

See the facts of this case reported in *23d vol. Ga. R. p. 242.*

Upon this cause again coming up to be heard, defendant's solicitors asked leave to amend his answer, by alleging that complainant was embarrassed in his circumstances, if not insolvent; and that the parties entitled, under the last will and testament of John Bowman, deceased, as contingent remaindermen to the property bequeathed to William Henry Long, would be prejudiced, and their interests in said property seriously jeopardized, unless the said Jesse L. Long, the complainant, be required to give good and sufficient security for the forthcoming of said property, in the event of said William Henry Long dying before he attained the age of twenty-one years; and praying the Court to decree that, upon defendant's turning over to said complainant said property, he should be required to enter into bonds, with good security, in such sum as may be deemed sufficient by the Court, to said defendant, as the executor of the said John Bowman, deceased, for the security, forthcoming and delivery of said property, in the event of said William Henry Long dying before he attains the age of twenty-one years; which request to amend the Court refused, and defendant excepted.

Bowman, ex'or, vs. Long, guard'n.

Defendant's solicitors then moved for a continuance of said cause, to afford them time and opportunity to file a cross bill against complainant, setting out therein the same matters, and praying the same relief that they had proposed by way of amendment to the answer. Which motion the Court refused, on the ground that Jesse L. Long, being a resident of the county of Troup, the Court did not have jurisdiction; to which decision counsel for defendant excepted.

Poe & Grier, for plaintiff in error.

E. A. & J. A. Nisbet, *contra*.

By the Court.—McDONALD, J. delivering the opinion.

The ward of complainant is entitled to the property, &c., sued for in this bill, subject to a remainder to the lawful heirs of the testator, under whose will, and the codicil thereto, he claimed, provided he should die before he arrives at the age of twenty-one years. The amendment proposed to be made to the answer of the defendant in the Court below, was intended to protect the interest of those contingently entitled in remainder.

[1.] The complainant in the Court below is, no doubt, under bond with good security to take care of the interest of his ward, but that bond affords no protection to the contingent remaindermen. The case being before a Court of Equity, it is suggested to the Court, that the guardian who is seeking to recover the property, &c., as the absolute property of his ward, is in embarrassed circumstances, if not insolvent, and that the interests of the contingent remaindermen will be exposed to injury and seriously jeopardized, unless the said complainant be required to give good and sufficient security for the forthcoming of the property, provided the contingency should happen, on the happening of which said interest was to accrue. No decree had been made when the defendant below moved to amend. We think that the Court ought to

Bowman, ex'or, vs. Long, guard'n.

have allowed the amendment; and I am disposed to think that a proceeding for the same object, in the same Court, would be in time, as long as the fund or property was under the control of the Court. There can be no question of the right of a party to move in such a case. It was the old practice to require security, in all such cases, for the protection of the interest of the remaindermen; but more recently, the tenant for life is disengaged of this burden, except in cases of danger to the interest in remainder. The Court will require security in all cases of questionable safety to the property or fund, for the remaindermen, in the hands to which it is about to be committed. *Foley vs. Barrell, 1st Bro. C. R. 274; 1 Sto. Eq. sec. 604.* This matter can be brought before the Court as well by the answer as by a cross bill. By the Act of 1857, (*Pamp. 156,*) any matter of defence which could have been theretofore available by a cross bill only, may now be brought to the consideration of the Court, and used as a defence, by way of answer. If a defendant may, by answer, go into such a defence, it is not too liberal a construction of the Act to hold, that he may, by answer, suggest a matter which cannot affect the complainant's title to what he seeks, but which puts a condition on his possession of it, which would be imposed by a more tedious proceeding.

[2.] If it had been necessary to file a cross bill in this case, we cannot see that there was any want of jurisdiction of the matter in the Superior Court of Bibb county. The sole object was to bring before the Court, in which a cause was pending for the recovery of a legacy, by the guardian of a tenant for life, which legacy was limited over on a contingency, the embarrassed circumstances or probable insolvency of the said guardian, that the Court might require him, before he took possession of the legacy, to enter into bond with security, to take care of the property for those having a contingent interest in remainder. If the original answer had disclosed the facts, there could be no question as to the juris -

McNair vs. Bateman and Talton.

diction, because it is the law of his own case, that if he be insolvent, he shall not receive the legacy until he shall find sureties that it shall be forthcoming, to answer the claim of the remaindermen, on the happening of the event on which they would be entitled.

Judgment reversed.

FELIX McNAIR, plaintiff in error, vs. BATEMAN & TALTON, defendants in error,

An execution issued from the Circuit Court of the United States for the Districts of Georgia, the lien of which is not extinguished, can claim money in the State Courts.

Certiorari, in Houston Superior Court. Decision by Judge Lamar, at chambers, July, 1858.

The Sheriff of Houston county, under two mortgage *f. f. s.* issued at the suit of Felix McNair, against Alexander Lee, levied on and sold a negro man named George, mentioned and contained in the mortgages. He refused to pay over the proceeds of sale to the plaintiff in the mortgage *f. f. s.*, under a notice from Mr. Pringle, that the proceeds were claimed by Bateman & Talton, assignees of an older execution issued from the Circuit Court of the United States, for the Southern district of Georgia.

The case was heard upon a rule against the Sheriff at the instance of McNair, the plaintiff in the mortgage *f. f. s.*.

The execution upon which Bateman & Talton relied was an *alias*, issued from the Circuit Court of the United States, dated 14th November, 1857. The original or first *f. f. s.*

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which had been lost, was dated 13th April, 1853, in favor of one David McDaniel, against Alexander Lee, and Henry Barton security, assigned to Bateman & Talton, 17th May, 1853.

The mortgages under which the *fi. fas.* issued were executed by Lee to McNair, one dated 14th July, 1854, and *fi. fa.* dated 13th June, 1856. The other dated 22d July, 1857, and the *fi. fa.* thereon dated same day. Both mortgages contained the negro George, who was levied upon by the Sheriff under the mortgage *fi. fas.*, and sold for \$1,500.

The Inferior Court held that the plaintiff in the mortgage *fi. fas.* was entitled to the proceeds of the sale of the negro, and ordered the rule to be made absolute against the Sheriff.

To this ruling, counsel for Bateman & Talton excepted, and sued out a certiorari to the Superior Court.

The presiding Judge of the Superior Court, after argument, decided that the assignees of the execution issued from the Circuit Court of the United States, were entitled to the money, and reversed the judgment of the Inferior Court.

Whereupon counsel for plaintiff in the mortgage *fi. fas.* excepted.

KILLEN; and GILES, for plaintiff in error.

PRINGLE, *contra.*

By the Court.—McDONALD J. delivering the opinion.

It is insisted, that, because the property was first levied on under the execution issued on the foreclosure of the mortgage, by the Sheriff or Coroner, it was not subject to levy under the execution issued from the Circuit Court of the United States. That is conceded, but it does not follow, that under our State law, that execution loses its priority. The priority of these judgments must depend on our State law

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and the construction given to it. By our law the priority of judgments must be determined by their dates. If they are of the *same* date, they are co-ordinate liens; if of different dates, they differ in degree and are not co-ordinate. In States where the lien of a judgment or execution, without reference to date, commences from the delivery of the writ of execution to the Sheriff, judgments and executions are co-ordinate liens, if you can call them liens, and it is at the option of the party to give them effect or not as a lien. If the lien of a judgment, whether it be the judgment of a State or Federal Court, depends on the State laws, then all judgments, State or Federal, obtained in this State, bind the property of the defendant from their dates respectively. It is said that the judgment of a Federal Court loses its lien, if an execution be not issued and returned within a year, and that in this case, the execution was not returned within the year. The judgment, it is insisted, must be revived before it, or the execution issued thereon, can have any effect. Such would have been the case, if no execution had been issued until after the year and the day. But that is not the case. The *fieri facias* was issued in time, but it was not executed. In such case, the judgment is not at all affected. It stands, and the plaintiff may have another execution, on returning and filing the first *fieri facias*, without notice by *scire facias* or otherwise to defendant. The lien of the Circuit Court, judgment and execution, was good and subsisting, whether tested by the common law rule or our State law. Shall this Court regard that judgment, if of older date than the State judgments and mortgages, as entitled to the money, or shall it exclude it, on the ground, that it is the judgment of a Court of Federal jurisdiction, and cannot be recognized in the State Court. It is a lien, and being the oldest judgment, it is the oldest lien on the property of the defendant. If the decision of the Supreme Court of the United States be correct, (unless there be something in the legislation of Congress or the State, or both, to prevent it,) it being a prior lien, it "gives a prior

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claim, which is entitled to prior satisfaction out of the subject it binds, unless the lien be intrinsically defective, or be displaced by some act of the party holding it, which shall postpone him in a Court of law or equity to a subsequent claimant. The single circumstance of not proceeding on it, until a subsequent lien has been attained and carried into execution, has never been considered such an act." *Rankin vs. Scott*, 12 Wheat. 179. If the principle of this decision be not controlled by subsequent legislation, and the proceeds of the sale of the property be not applied to it, the lien remains, and the property may be seized and sold under a subsequent lien. Purchasers at legal or judicial sales are exposed to unjustifiable losses by the enforcement of secret liens. To prevent this evil, the Act of 1810 was passed. Cobb 496. By that Act, judgments obtained in any of the Courts in this State, are entitled to claim money raised on the sale of the defendant's property under judgments of younger date, provided the claim is made before the money is paid over to the plaintiff in the execution which raised it. This Act has been construed as imperatively requiring parties holding older judgments to interpose them to claim the proceeds of the sale of property, when sold under a junior judgment. It has always been held since that Act, in consequence of the right of older judgments to claim the proceeds of sale, that the purchaser takes a title to the property sold disengaged of the older judgment liens. But it must not be held that if an older judgment cannot or shall not be interposed to claim the money, it shall lose the lien. If a judgment of the Circuit Court cannot be allowed to claim money in a State Court under the Act, shall it lose its lien on the property, when it is only on the ground of the right to claim, that the lien of the judgment of a State Court is lost?

We think that we are but adhering to the proper construction of the Act of the Legislature, and of its true policy, when we affirm the judgment of the Court below. The purchaser will get a title not subject to disturbance, and judgment credi-

Brett vs. Sellers and Sapp.

tors, State and Federal, will be placed on an equal footing in regard to their liens.

Judgment affirmed.

JAMES G. BRETT, plaintiff in error, vs. **JOHN W. SELLERS** and **LUKE M. SAPP**, defendants in error.

Where the equity of a bill is fully met and distinctly denied, proceedings at law will not be restrained, unless under special circumstances.

In Equity, from Calhoun county. Decision by Judge **ALLEN**, at May Term, 1858.

This was a bill by James G. Brett, against John W. Sellers and Luke M. Sapp, seeking to enjoin the collection of two promissory notes made by Brett and James Phillips, payable to said Sellers or bearer, and by sellers transferred to Sapp.

The bill states that complainant Brett, and the said Phillips, purchased from Sellers, lot of land No. 158, in the third district of Calhoun county, and gave therefor their two promissory notes. One for one hundred dollars, dated 26th September, 1854, and due 1st January, 1855; the other for four hundred dollars, of same date, and due 1st January, 1856, both payable to Sellers or bearer, and that they received from him a deed for said land with the usual covenants of warranty. That ejectment, to recover saic' land from the assignees of complainant and Phillips, was instituted and resulted in a verdict and judgment in favor of the plaintiffs in said action. The deed from the grantee to said Sellers, turned out on said trial to be a forgery. That Sellers has removed beyond the limits of the State, and is insolvent.

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That said notes have come into the possession of Sapp, who has put the same in suit, and obtained judgment on one, and is pressing the other to trial; both against complainant alone. Phillips having removed from the State; and that Sapp is acting either as the agent of Sellers in the prosecution of the suits on said notes, or obtained the same from him, with a full knowledge of the fraud and forgery by which they had been obtained from complainant and said Phillips. The prayer of the bill is for an injunction to restrain the collection of said notes, and to enjoin all further proceedings upon the judgment obtained on the one note, and the suit pending on the other.

An injunction issued as prayed, and upon the coming in of the answer of the defendant Sapp, denying all the material charges and allegations of the bill, the Chancellor dissolved the injunction as to him, and complainant excepted.

After the filing of the answers, complainant amended his bill alleging that Sapp too was insolvent, and complainant objected to the motion to dissolve the injunction until said amendment was answered, which objection the Court overruled, and complainant excepted.

R. H. CLARKE; and R. F. JONES, for plaintiff in error.

I. E. BOWER, *contra*.

By the Court.—LUMPKIN J. delivering the opinion.

Was the Court right in dissolving the injunction?

We do not see that it could have done otherwise. Seller's answer, if procured, could not prejudice Sapp, and Sapp swears that he is the *bona fide* holder and owner of the note.

Judgment affirmed.

Judge McDONALD, on account of illness, did not preside in this case.

Williams et al. vs. Cowart.

JOHN DOE, ex dem., HENRY WILLIAMS, and others, plaintiffs in error, vs. RICHARD ROE, cas. ejector, and JAMES H. COWART, tenant in possession, defendant in error.

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114 715

[1.] If the subscribing witnesses of a lost deed be dead, and the original be not subscribed by a Justice of the Peace or other officer whose attestation is sufficient to admit it to record, nor affidavit be made of its execution, inferior evidence of its contents and execution may be adduced, and if a copy be established by the judgment of Court, evidence of that being made, the established copy ought to be admitted.

[2.] Title to land cannot be passed but by writing.

Ejectment, from Twiggs county.

This was an action of ejectment by Doe, upon the several demises of Drury Williams and Henry Williams, against Roe, casual ejector, and James H. Cowart, tenant in possession, for the recovery of a fractional lot of land lying on the Ocmulgee River, in the county of Twiggs, No. 194, containing one hundred and ninety-six acres, known as the "Dawson" or "Lewis" fraction.

The case came on to be tried upon the appeal, when plaintiff offered in evidence a copy deed of gift for the land in dispute from Drury Williams to Henry Williams the lessor, Drury being his father. Said copy had been established by order of Court, in lieu of the lost original.

The Court rejected the deeds thus offered, on the ground, that neither of the subscribing witnesses to said deed was a Justice of the Peace, or other officer authorized to attest deeds. Nor was there an affidavit by either of the subscribing witnesses, as to the execution of said deed. To which ruling plaintiff excepted.

Plaintiff then offered and read in evidence a deed for this, among other lands, from John Chapman, Calvin Rutland, Mary Howell, Reddin Rutland and John D. Rutland, to defendant, dated 30th July, 1854.

Williams et al. vs. Cowart.

Plaintiff then read in evidence the answers of Samuel Howell and Mary Howell, to interrogatories.

Samuel Howell, answers: That he knows nothing of his own knowledge about the sale of fractional lots of land, Nos. 215 and 216, lying in Twiggs county, on the Ocmulgee river, but has heard the Rutlands conversing on the subject, and heard them say, that they had sold said lots, and has also heard defendant say that he purchased said lots of the Rutlands, and the wife of witness, to wit; Mary Howell.

Cross-Examined—Answers: That he don't know that the land ever belonged to him, witness, or his children. Don't know that Drury Williams gave the land to him and his children, but there was a clause in said Drury's will, giving all the land he owned in Georgia, to the children of Redding Rutland and his daughter Polly Rutland, that he has received notice of the pendency of this suit, and has also been notified that Henry Williams was claiming the land.

Nancy Howell, answers: That she knows that her children and son-in-law, John T. Chapman, sold a piece of land lying on the Ocmulgee river in Twiggs county, to James H. Cowart, but don't know the numbers of said land—knows that the land was her father's, Drury Williams, and was known as the Williams land—knows that it was her father's, because he always claimed it in his lifetime, and never knew his right to it questioned.

Cross Int.—She always thought the land belonged to her and her children, under Drury Williams' will—she has been notified of the pendency of this suit, and that Henry Williams was claiming and suing for the land.

Plaintiff then read in evidence, the answers of *William Williams*, who testified, that Drury Williams in 1827, made a division of his property among his children, in which division he gave to my brother, Henry Williams, plaintiff, in addition to certain negroes, two lots of land; one known as the "Rutland land," and the other as the "Lewis and Dawson fraction;" was not present at the division, neither did I

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see any title pass between them, but father informed me that he gave Henry Williams the land above named. Henry, with the knowledge of our father and of my own knowledge, went into possession and cultivated the land in 1828; in 1829, witness rented the lands to Reason D. Beale of Macon, as the property of Henry Williams, and this too, came within the knowledge of our father, he making no claim to the rent, or pretending to exercise any ownership over the premises; these lands are in Twiggs county, numbers not known, but they are known as the lands formerly belonging to our father, Drury Williams. The Rutland lot is an upland lot, and takes its name from the fact of Rutland having lived on it." (*Here he gives the boundary of the lot.*)

"The other lot is a fraction on the Ocmulgee," (*giving the boundary.*) "This lot formerly belonged to Daniel Davis, who sold it to Dawson, and as well as remembered, sold at Sheriff sale as the property of Dawson, and purchased by our father, Drury Williams. Knows that his brother Henry was in possession of these lands in 1828, and heard his father say he had given them to him."

Plaintiff then read in evidence the answers of *Washington Durden*, taken by commission, who testified: That he "knows a fractional lot of land in Twiggs county, lying in the river swamp, on the Ocmulgee river, formerly belonging to Drury Williams, who told witness that if he wanted to buy said lot of land, he must go to his son Henry Williams, that he had given said lot to him; knew it as the Williams fraction, but don't recollect the number or district. Has heard James H. Cowart say, that he was in possession of said fraction; don't know how long Cowart has been in possession, but thinks about three years. Proposed to buy the lower lot or fraction from Drury Williams, who told witness that he had given the two fractions to his son, Henry Williams. Cowart told witness that he bought said land from Rutland's heirs, and that it was willed to them by Drury Williams. Cowart acknowledged that the land he was in

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possession of was the land Henry Williams claimed." Here plaintiff closed. Defendant introduced no testimony.

Plaintiff's counsel requested the Court to charge the jury, that if they believed from the evidence, that plaintiff and defendant both claimed title from Drury Williams, then the admissions of Drury Williams that he had made a deed of gift, or had given the land in dispute to Henry Williams, and that he had gone into possession under said gift, then under the circumstances of this case, the defendant was bound by said admissions, which charge the Court refused to give, and plaintiff excepted.

The Court directed the jury, that defendant was entitled to a verdict, who found accordingly, and plaintiff excepted. And therefore plaintiff tenders his bill of exceptions, assigning as error the foregoing decisions and rulings.

POE & GRIER, for plaintiff in error.

STUBBS & HILL, *contra*.

By the Court.—McDOXALD, J. delivering the opinion.

The record in this case contains two assignments of error, one is on the judgment of the Court sustaining a demurrer to evidence, and the other on the refusal of the Court to give in charge to the jury a request submitted in writing by the counsel for plaintiff. The plaintiff offered in evidence proceedings had many years ago in Twiggs Superior Court, for the establishment of the copy of a lost deed to the premises in dispute, including the rule absolute or judgment of the Court establishing the copy, and also the copy deed as established. This evidence was demurred to, and the Court overruled the demurrer as to the proceedings in the Superior Court and judgment, but sustained it as to the copy deed, because of the deficiency of proof of its execution, neither of

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the attesting witnesses being a Justice of the Peace or other officer authorized to attest deeds, and there being no affidavit of either of the subscribing witnesses proving its execution.

[1.] In this Court other grounds of objection are urged against the admissibility, in evidence, of the copy deed, than were presented in the Circuit Court. It is here insisted, first, that the proceedings for establishing the copy deed in Twiggs Superior Court, are void, there being no persons named in said proceedings as defendants, and that it does not appear that any person was served, or that any of the defendants resided in the county of Twiggs at the time. It appears that the heirs at law of Drury Williams were parties defendant, and that they were required by the Court to be served personally with the rule *nisi*, to establish said copy, and that they were served agreeably to said requirement. We think, therefore, that there were defendants to said proceeding, and that they were served. It does not appear that the Superior Court of Twiggs county *had not* jurisdiction of the case. The Superior Courts are Courts of general jurisdiction, and at the time of said proceedings, they were Courts of final resort, and the highest judicial tribunals known to the Constitution and laws: The Superior Court of Twiggs county gave this judgment. It stands there unreversed; and stands there as the judgment of a Court of competent jurisdiction. It, like all other judgments, may be impeached for fraud, and such irregularity as would avoid a judgment, but none such appears in the record before us. It is objected further, that Drury Williams, the feoffor, of Henry Williams, one of the lessors of the plaintiff, left a will and devised the land, and that the devisees of the land, and not the heirs at law of the said Drury Williams, should have been made parties defendant. This objection is founded on the assumption, that the judgment of the Court establishing the copy deed is *res inter alias acta*, and cannot be admitted in evidence against the devisees or those claiming under them. It appears in

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this record, that one of the heirs at law is also a devisee, and upon the assumed ground of objection, the judgment is good against that devisee. But under the term "parties," the law includes all who are directly interested in the subject matter, and had a right to make defence, or to control the proceedings and to appeal from the judgment. 1 *Greenleaf*, Sec. 523. A devisee of lands is an *hæres factus*, and so made by the will of the testator. *Bac. Ab. Heir and Ancestor*, B. If there had been no actual or valid grant or donation of the land by the testator in his life time, the devisees were interested in the subject matter, and on that ground might have defended the application to establish the deed—and might have appealed from a verdict adverse to their interest. The record and deed was therefore admissible against them.

It is again objected, that as the original deed could not be admitted as evidence, without proof of execution, the copy deed must also be proven to be the copy of a genuine original. We think, that the judgment of the Court established the copy offered in evidence as the copy of a genuine original conveyance. The case of *Beverly vs. Burke* in 9th Ga. is referred to as an authority to sustain this objection. It does not appear in that case, as it does in this, that the subscribing witnesses were dead. In the case of *Keeling vs. Ball*, it being a suit on a lost bond, which had been attested by witnesses, the names of whom had been forgotten, Lord Kenyon who tried the case, held that if it appeared who the subscribing witnesses were, they must be produced; but that it was the business of Courts of justice to apply the general principles of the law to the new cases as they arise. He said that was a new case, for it did not appear that the plaintiff could by any possibility know who the subscribing witnesses were. The subscribing witnesses, if they had been known, were the best evidence, *but not* being known, the rule had to be relaxed, and inferior evidence admitted. *Appendix to Peake's evidence XXIV*, 1st Am. from 5th London Edition. See also, 7 *Waddell*, 125. Here I think the

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judgment establishing the deed would have been good without the witnesses, if they had been known; for it cannot be presumed that a Court would allow a copy of a forged or fraudulent deed to be established. But it must clearly be right when the attesting witnesses are dead.

We think that for the rejection of the deed, judgment of the Court below must be reversed.

[2.] We are of opinion that the Court below very properly refused to give the request of counsel for plaintiff in charge to the jury. Conveyances of land must be in writing. Parol evidence may be given in evidence, in proper cases, to prove the contents of written conveyances, but it is inadmissible as evidence to pass the title.

Judgment reversed.

**ALBERT S. ELMORE, plaintiff in error, vs. WILEY SPEAR,
et al., defendants in error.**

A creditor who files a bill to enforce a legal right, and to collect his debt from legal assets, cannot be compelled to make other creditors parties to his bill.

In Equity, in Macon Superior Court. Decision by Judge Lamar, at September, Term, 1858.

Albert S. Elmore filed this bill against Wiley Spear, John Spear and Samuel M. Strong, of the State of Alabama, and Davis Gamage, of Macon county, Georgia. The bill states that about the 1st of May, 1854, Wiley Spear being indebted to John Spear, his son, the sum of \$2,025 00, executed and delivered to him forty-five promissory notes, each for \$45, payable the 25th December, 1854. That John Spear, in the

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fair and usual course of trade, and for a valuable consideration, endorsed and delivered said notes to complainant, who became the owner thereof. That before the notes became due, with a view to defeat their collection and the collection of other demands against said Wiley Spear, he left the State of Alabama and fled to parts unknown, and his residence is still unknown to plaintiff. That about the time he absconded, he placed in Strong's hands, about ten negroes, to carry off and sell, and convert the same into money, which could not be reached by plaintiff and other creditors of Wiley Spear. That the negroes were worth *three thousand six hundred dollars*.

The bill further states, that in the execution of this purpose of defeating and defrauding the creditors of the said Wiley, Strong about the 15th December, 1854, brought the negroes to Macon county, Georgia, where four of them were taken from him by one McGibbony and one Bickerstaff, for a debt which Bickerstaff held against said Wiley. That Davis Gamage purchased from Strong six of said negroes, with a full knowledge of all the facts, communicated to him by Strong. That Wiley Spear, John Spear, and Strong are insolvent. That complainant has not been able to ascertain where said negroes, sold to Gamage, are, or in whose possession they are.

The prayer of the bill is that complainant may have a decree against Wiley Spear for the amount of his demand, to be paid out of the negroes placed in the possession of Gamage by Strong or the proceeds of their sale, and that Gamage be decreed a trustee and compelled to account and pay to complainant the amount due to him, and for such other and further relief as the circumstances of the case require.

Samuel M. Strong, in his answer, says that he knows nothing of the indebtedness of Wiley Spear to complainant, of his own knowledge, but was informed by Spear that he was owing him a large amount, which he considered a confidential debt and intended to pay. He admits that ten or

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eleven negroes were placed in his hands in the State of Georgia by one Sewell, a son-in-law of Wiley Spear, and that as agent he sold to Gamage *three* of said negroes for \$1,100. That he sold to Bickerstaff, five of said negroes for about seventeen or eighteen hundred dollars, a large part of which was covered by demands which Bickerstaff held against Wiley Spear; and the balance was paid in money and a note for \$250 payable to defendant. He admits that he stated to Gamage that Spear was in debt, that he had left property in Alabama sufficient to satisfy all judgments against him, and that he wished to sell the balance to enable him to pay some confidential debts and to compromise with his Charleston and New York creditors to the best advantage. He further admits that he stated to Gamage that Spear had a right to prefer creditors, to sell property unencumbered by judgment, and that the title would be good. That he subsequently and before the filing of complainant's bill, settled with Spear and took his receipt in full of all demands. Has not seen the negroes since he sold them to Gamage. Denies complainant's right to relief in equity; denies and repels the charge of fraud, &c.

Davis Gamage, answers, and admits that he purchased three negroes from Strong, belonging to Wiley Spear of Alabama, in December, 1854, for \$1,100, which he has since sold; defendant speculates in negroes, and sold the negroes which he bought from Strong long before this bill was filed; does not know where they are now; denies all fraud; knows nothing of Spear's indebtedness to complainant. Bought said negroes *bona fide*, and paid a fair and full price, and had no knowledge or suspicion that any fraud was being committed, or intended to be, on complainant or any other creditor of Spear.

Upon the case being called for trial, defendants counsel moved to dismiss the bill, on the grounds that it was a creditor's bill, and that complainant was prosecuting it alone and

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in his own name only, and that it was necessary that the other creditors of Wiley Spear should be made parties.

After argument, the Court ordered, that complainant amend his bill making the creditors of Wiley Spear, parties complainants, or making an offer to them to come in as parties, &c.

To this order, counsel for complainant excepted.

MILLER & HALL, for plaintiff in error.

COOK & MONTFORT, *contra*.

By the Court.—McDONALD J. delivering the opinion.

This is not technically a creditor's bill. The assets which the creditor proposes to reach are not equitable, but legal assets. The only circumstance which authorizes the complainant to go into chancery, is his inability to identify the property or make the necessary proof to sustain a remedy at law, which otherwise, would be adequate, without a discovery from the defendant, which he avers to be necessary. A single creditor may file a bill to reach legal assets, and if he gains thereby a priority over other creditors, he will be entitled to retain it. *2nd Danl. Ch. Prac.* 204 &c; *Story's Equ. Jur. Sec.* 546, &c.

The defendant in such cases has no interest in the question so far as the rights of the creditors among themselves are concerned. If the complainant succeeds in holding the defendant to account, the costs must be paid from the fund, and expenses also, except those incurred by the defendant in sustaining his purchase, or his right to retain the amount actually paid by him. The creditors are not moving here to be made parties; not even Bostick whose evidence was taken in this case, and who must of course, know of the entire proceeding. The complainant may control his own case, *McDougald vs. Dougherty*, 11 Ga., 588. And when a single creditor is in pursuit of *legal* assets, he cannot be forced

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to divide with other creditors. It is otherwise with equitable assets. In this case the bill alleges that the defendant holds the property in trust for complainant and other creditors, but it discloses also, that the trust arises from the alleged fraud of the defendant and is implied in law and not that there was any trust created by contract for the payment of creditors.

Judgment reversed.

Wm. McDaniel, plaintiff in error, vs. the STATE OF GEORGIA, defendant in error.

It is not error for the presiding Judge in the Court below to refuse to allow an offender to settle a criminal cause of the grade in which he is vested with discretion to allow the settlement or not.

Indictment for Assault and Battery, in Dooly Superior Court. Decision by Judge Lamar, at October Term, 1858.

The grand jury made a special presentment against William McDaniel, charging him with the offence of assault and battery upon Elizabeth McDaniel, his wife.

The defendant pleaded not guilty. Bill of indictment waived and consent that the special presentment stand in lieu thereof.

Upon the case being called for trial, Mrs. McDaniel the wife of defendant, presented in writing a demand that the case be entered settled; claiming that under the statute providing for the settlement of criminal cases, she was entitled to this entry or order.

And she assigned as her reasons for making this demand; 1st. Because she had never authorized the prosecution to

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be commenced, it having been carried on by persons, against her wishes, who are the enemies of her husband, and whose interference she not only does not desire, but the same is repugnant to her wishes and feelings.

2d. Because the unpleasant occurrence, the subject matter of the presentment, was immediately made up between her husband and herself, and mutual forgiveness granted; and that her husband has since become a member of the church, and is making, as she believes, an effort to live a better life, and, for this reason, she does not wish him disturbed and distracted on account of his prior misconduct or faults.

3d. Because her husband is an industrious man, providing for his large family, consisting of applicant and eleven children, whom he has to support, and whom he does well support by his industry; and the troubles growing out of this case have greatly embarrassed him, and if it proceeds, the fines will greatly impoverish him, and the loss and suffering will fall on herself and little children, whose sufferings are not regarded by those who are urging this prosecution.

4th. Because, the petition which she presents for the settlement of this prosecution, has been cheerfully signed by all the influential, wealthy and moral portion of the community.

5th. Because she herself has acted wrong in their past differences as well as her husband, and if they are satisfied to forgive each other and forget the past, and look forward to the future with hope, she cannot see why their misfortunes should be dragged before the public, and the secrets of the domestic hearth be made the subject of jest for the vulgar.

6th. Because, and more than all, she desires and demands that this prosecution be settled "for the sake of their infant children to whom she does not desire to transmit the memory of these domestic afflictions, now happily passed, as she hopes."

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The Court at the instance of the Solicitor General, refused to hear Mrs. McDaniel's application, until the defendant should announce whether he was ready for trial. To which ruling, counsel for Mrs. McDaniel excepted.

The defendant then continued the case on grounds satisfactory to the Court. When Mrs. McDaniel's application was again taken up by the Court, and she offered to prove that the proceedings had been originally commenced by a prosecutor who had made an affidavit and had defendant arrested, but that it had been so managed as to drop the prosecutor's name and have a special presentment preferred. This proof the Court repelled, and counsel for Mrs. McDaniel excepted.

Mrs. McDaniel then tendered in evidence to the Court a petition, signed by about fifty persons, many of the grand jury, praying that the indictment against defendant should not be further prosecuted.

The Court refused the application to have the case settled, holding that Mrs. McDaniel had no right, under the statute, to have the case settled, and passed the following order:

"The State vs. William McDaniel: On hearing the demand of Mrs. McDaniel and the proof offered and tendered by her, it is ordered, that the application for a settlement of the case under the statute be and the same is hereby refused and overruled." Whereupon counsel excepted, and tender their bill of exceptions, assigning as error the foregoing rulings, decisions and order.

THOS. H. DAWSON, JNO. B. COLDING, A. P. POWERS, for Mrs. McDaniel, and defendant Wm. McDaniel.

Sol. Gen. MONTFORT, *contra.*

By the Court.—McDONALD J. delivering the opinion.

There is a class of minor criminal offences which may be settled by the offender with the prosecutor, with the consent

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of the injured party, at any time before verdict. They are such offences as are not punishable by fine and imprisonment or a more severe penalty. The settlement may be made independent of the Court, and without its consent. Offences of higher grade than these above mentioned, cannot be settled without the consent of the prosecutor shown to the Court, nor without the consent of the Court by order entered on the minutes. *Cobb's Dig.* 864. The plaintiff in error is indicted for assault and battery, and on conviction, he may be punished by fine and imprisonment in the common jail, and his offence, therefore, does not fall within the class which may be settled by him without the consent of the Court. It was within the discretion of the Court below to allow it to be settled or not, and there can be no legal error in the exercise of that discretion, and we, therefore, affirm the judgment.

My brethren are of opinion, that the parties ought to have been allowed to settle, upon the appeal which was made to the Court, as the indictment grew out of a family affair. I can express no such opinion. The application to the Court, as shown to us in this record, is not sustained by evidence. I think on such applications the Court ought to be satisfied that the interests of the community, and of the injured party, will suffer no detriment by allowing the settlement.

Judgment affirmed.

**PETER SOLOMON, plaintiff in error, vs. WILLIS S. BREAZEAL,
et al., defendants in error.**

Levied this *s. fa.* on "the undivided interest of Mary Moore and Henry E. Moore, in the following negroes," &c., "the interest being such as is conveyed

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to them by deed on record in the Bibb Superior Clerk's office, by George W. Moore, 19th August, 1843, and recorded 8th September, 1843."

Held, That the levy in this case was sufficiently definite and certain.

Claim, in Bibb Superior Court. Decision by Judge LAMAR, at November Term, 1858.

Under a *f. fa.* issued at the suit of Peter Solomon against Willis S. Breazeal, Henry E. Moore and Mary Moore, the Sheriff of Bibb county made a levy upon certain negroes, which levy was entered on said *f. fa.* in the following words:

"Levied this *f. fa.* on the undivided interest of Mary Moore and Henry E. Moore, in the following negroes: Adam, 45 years old; Charles, 18 years old; Elvira, 38 years of age; Richard, 9 years old; Ellen, 8 years of age; Eugene, 1 year old; Eveline, 29 years old; Eveline, 9 years old; Linda, 7 years of age; John and Eliza, twins, 10 months old: their interest being such as is conveyed to them by deed on record in Bibb Superior Clerk's office, from George W. Moore, 19th August, in the year 1843, and recorded 8th September, 1843. Levy made 16th January, 1857.

(Signed) R. B. BARFIELD, *D. Sh'ff.*"

Willis S. Breazeal, as trustee of Mary Moore and her children, interposed a claim to said negroes, and the issue being made up as provided by statute, was submitted to a jury.

The plaintiff in execution offered and read in evidence, the *f. fa.* dated 5th January, 1855, for \$2,000 00 principal, and \$261 31 interest, besides cost.

Counsel for claimant objected to the introduction in evidence, of the levy entered on said *f. fa.*, upon the ground that said levy was not sufficient in law, and moved to dismiss the same.

For the purpose of showing and defining the interest levied on, plaintiff offered the original deed from George W. Moore, conveying said negroes, in connection with the execution and levy. Claimant objected to the introduction of this deed, upon the ground that the levy could not be aided

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thereby, and could not be amended. The Court sustained the objection, and excluded the deed.

Plaintiff then moved to amend the levy by specifying and inserting the words "two-fifths as the undivided interest" so levied on, Barfield, the Deputy Sheriff, being then in Court, and ready to make the amendment. The claimant objected. The Court sustained the objection, upon the ground that the Deputy Sheriff's term of office having expired, he could not amend the levy.

Upon motion then by claimant's counsel, the Court dismissed the levy.

To all of which rulings and decisions, plaintiff in *fa. fa.* excepted.

SPEER & HUNTER; NISBETS, for plaintiff in error.

JOHN RUTHERFORD; C. B. COLE, *contra*.

By the Court.—LUMPKIN J. delivering the opinion.

The only question in this case is, as to the definiteness of the levy. It is of the interest of the defendant in certain slaves, and refers to a deed of record showing what that interest is.

No case decided by this Court controls this. Here, the instrument of writing referred to, shows the interest of the defendants in the property, and that is what is levied on. And if there be doubt or uncertainty resulting from the construction of the deed, or from outside facts—such as the number of children, &c,—that the purchaser must ascertain for himself. It is neither the duty of the creditor or the Sheriff to do this. And it would be dangerous so to hold.

Judgment reversed.

MCDONALD J. absent.

McKay et al. vs. Ragan.

**W. D. MCKAY, et al., plaintiffs in error, vs. JAMES W. RAGAN,
defendant in error.**

M. was arrested upon *ca. sa.*, and gives bond for his appearance at a certain Court, to take the benefit of the Insolvent Debtors Act. At the Term specified, the case is reached in its order on the docket and called, but there is no appearance. Judgment was entered up on the bond. Subsequently, and after the jury was discharged, the attorney of the security surrenders up the principal in open Court, and upon his motion, the judgment is set aside, the security exonerated, and the case continued until the next Court.

Held, That it was error to re-open the proceedings, vacate the judgment, and discharge the security.

Certiorari, from Sumter county. Decision by Judge ALLEN, at September Term, 1858.

Upon a judgment obtained by James W. Ragan against William D. McKay, a *capias ad satisfaciendum* issued, and McKay being arrested, entered into bond with Alexander M. Little as his surety, conditioned to appear at the Term of the Inferior Court to be held in and for the county of Sumter, on the third Monday in May, 1858, to abide such order and judgment as might then and there be rendered in relation to his taking the benefit of the Act for the relief of honest debtors. At the said May Term of said Inferior Court, the cause being regularly called, and McKay and his surety both failing to appear, judgment was entered up against them.

Afterwards, and after the jury were discharged, during the same Term of the Court, McKay was surrendered in open Court by the attorneys of Little, and thereupon, on motion of counsel for Little, the Court granted an order, vacating and setting aside the judgment rendered against McKay and Little, and exonerating Little from said bond, and continuing the case until the next Term of the Court.

To this order counsel for plaintiff objected, and duly filed his exceptions, and applied for a *certiorari* to have said order reversed.

The *certiorari* issued, and upon the hearing, the Superior

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Court, (ALLEN J. presiding,) ordered and adjudged that said order of the Inferior Court be set aside and reversed, and that the judgment rendered in favor of plaintiff stand in full force.

To this decision counsel for McKay and Little excepted.

McCoy & Hawkins, for plaintiffs in error.

A. R. BROWN, *contra.*

By the Court.—LUMPKIN J. delivering opinion.

A *ca. sa.* bond to take the benefit of the Insolvent Debtors Act is returnable to a particular Court. The case is reached in its order and called; and there being no appearance by the principal or his security, judgment is taken on the bond. Afterwards, and after the jury were discharged, the debtor is surrendered in open Court by the attorney of Little, his bondsman. And upon motion, the judgment is vacated, Little exonerated, and the case continued until the ensuing Term of the Court.

We concur with the Circuit Judge, that the Inferior Court was manifestly wrong in allowing the judgment to be opened and set aside, by the delivery of the debtor. Great mischiefs would result from such a practice.

Judgment affirmed.

McDONALD J. absent.

Patterson vs. Esterling and McBain.

WILLIAM J. PATTERSON, plaintiff in error, vs. **BENNETT ESTERLING**, defendant in *fi. fa.*, and **NEWMAN MCBAIN**, claimant, defendant in error.

A mortgagee need not make proclamation of his mortgage, in order to protect his lien, provided the mortgage has been duly recorded. Nor does it make any difference in this respect, whether he be casually present at the sale of the mortgaged premises, under a common law execution of a junior lien or not, provided he does nothing to countenance the sale. His silence will not prejudice his lien.

Levy and claim, in Sumter Superior Court. Tried before Judge **ALLEN**, at September Term, 1858.

On the trial of this cause in the Court below, the plaintiff in *fi. fa.* introduced in evidence, a mortgage *fi. fa.* against lot of land number two hundred and fourteen, in the twenty-eighth district of Sumter county, which had been levied on said land. The mortgage had been properly recorded.

On the trial, there was an admission in writing, by claimant's counsel, that Esterling, the defendant in *fi. fa.*, was in possession of the said land, at the date of the mortgage. Plaintiff then closed his case.

Claimant then introduced *Sterling Glover*, who testified, that while acting as Sheriff of said county, he levied a *fi. fa.*, younger than plaintiff's mortgage, on the said lot of land, as defendant's property, and sold it to McBain for one hundred dollars; that McBain paid him the money, and he made McBain a deed; that when the land was offered, Patterson, the plaintiff, was in the crowd; that about the time the land was knocked off, Patterson made known, by proclamation, his mortgage lien, and McBain desired to withdraw his bid, but witness would not allow him to do it; that he thought the hammer came down before the proclamation was made, but was not certain about it.

Plaintiff then introduced *James W. Regan*, who testified, that he was present at said sale; that he heard Patterson

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give notice of his mortgage lien; that it was given *before* the land was knocked off to McBain.

Plaintiff then introduced *McBain*, the claimant, who testified, that the notice was given before the land was knocked off, and that he desired to withdraw his bid, but the Sheriff would not let him; that he had heard of the mortgage before the day of sale, but thought it was settled.

Here the evidence closed, and the Court was requested to charge the jury, that McBain had the right to withdraw his bid as soon as he heard Patterson's notice, and if he bought any thing at said sale, it was only the equity of redemption. Which charge the Court refused to give, but charged the jury, that if plaintiff was standing by and permitted the property to be offered, and gave no notice of his mortgage, and McBain had made a bid before Patterson gave the notice, then McBain acquired a right to have the land knocked off to him, (no one making a higher bid,) and that he got a good title. To which charge and refusal to charge, plaintiff excepted.

SULLIVAN, for plaintiff in error.

McCoy & Hawkins, *contra*.

By the Court.—LUMPKIN, J. delivering the opinion.

Bennett Esterling mortgaged to Wm. J. Patterson lot of land No. 214, in the 28th district of Sumter county. The mortgage was duly recorded. The land was subsequently sold under a common law *fit. fa.*, and knocked down to Newman McBain. Patterson was present at the sale. All admit that he gave notice of his mortgage lien. Glover, the Sheriff, testifies that proclamation was made about the time the land was knocked off. He thought the hammer came down before the proclamation was made, but was not certain about it. James W. Ragan swears positively that the notice was given before the land was knocked off. And McBain him-

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self being sworn, says, that notice was given by Patterson before the land was bid off; and that he desired to withdraw his bid, and the Sheriff would not permit him to do so. He further admits, that he had heard of the mortgage before the day of sale, but thought that it was settled.

Suppose Patterson, being present, had kept silent, his mortgage having been duly recorded, would he have lost his lien? Surely not. But upon the fact of *actual* notice, the weight of the proof is entirely with Patterson. There can be no doubt but that he is entitled to enforce his lien on the land.

Judgment reversed.

MCDONALD J. absent.

**ABNER M. LOCKETT, plaintiff in error, vs. NEEDHAM MIMS,
defendant in error.**

[1.] Proof that it is the general plan of a father to *borrow*, and not to *give* slaves to his children, when they marry or settle in life, is admissible to rebut the presumption of a gift arising from the possession of slaves by a married daughter. Nor is this testimony controverted by the evidence that he had given land to some of the children.

[2.] Professional propriety in the argument of causes.

[3.] The discretion of the Circuit Judge in refusing to grant a new trial, will not necessarily be overruled in this Court, notwithstanding we may think the verdict contrary to the weight of evidence.

[4.] "It was my understanding," used by a witness, may and ordinarily does mean, his knowledge or recollection of the facts.

It is not error to exclude immaterial testimony.

Complaint, in Bibb Superior Court. Tried before Judge LAMAR, at November Term, 1858.

This was an action by Needham Mims against Abner M. Lockett, for the recovery of six or seven negroes, which the

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declaration alleged were the property of plaintiff, and in defendant's possession, &c.

It appeared that Lockett married a daughter of plaintiff, and sometime thereafter, about 1850, the negroes went or came into the possession of Lockett, and had remained there ever since. Plaintiff alleges that they were only *loaned* to defendant. Defendant claims that they were absolutely *given* to him.

The action was commenced in April, 1856.

The defendant pleaded the general issue, and statute of limitations.

The case was submitted to the jury upon the evidence adduced by both parties, who after argument, found a verdict in favor of plaintiff for \$2,500.

Whereupon defendant moved for a new trial, upon the following grounds:

1st. Because the Court erred in admitting that portion of Charles W. Mims' testimony relating to the general plan of plaintiff to *loan* and not to *give* negroes to his children, and in overruling defendant's objection thereto.

2d. Because the Court erred in refusing to permit defendant to prove that plaintiff had departed from his general plan of loaning, and not giving property to his children, by not allowing him to prove that he had given to defendant, and Thomas N. Mims *land*: and in holding said testimony to be irrelevant.

3d. Because the Court permitted Mr. Gresham, the attorney for plaintiff, who concluded the argument before the jury, to refer to and comment upon facts and circumstances not in evidence, and in not interposing until called upon by defendant's counsel to do so.

4th. Because the jury found contrary to law and equity.

5th. Because the verdict is directly and strongly against the weight of evidence.

6th. Because the verdict is without evidence to support it

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7th. Because the verdict is of such a character as to show that it was the result of undue influence, and the offspring of passion and prejudice.

8th. Because the Court erred in admitting the answer of Charles W. Mims to the second direct interrogatory, and in overruling plaintiff's objection thereto, on the ground that it was only the inference of the witness from certain irrelevant facts therein stated.

9th. Because the Court erred in ruling out the answer of Charles W. Mims to the third cross interrogatory, that "when he (witness) was moving to Washington, he asked his father to loan him his wagon to move his negroes to Howard's station; that his father replied that he would, but that he, witness, had better take them to Macon. Witness replied, no, it was too far to take them through the cold, Howard's station was nearer; and the wagon took them to Howard's; father set up no claim to the negroes, and never said they were not his, witness's, negroes."

The Court refused the motion for a new trial, upon each and all the grounds therein set forth; and to which decision defendant excepted.

HALL, RUTHERFORD, and POWERS, for plaintiff in error.

GRESHAM, and NISBETS, *contra*.

By the Court.—LUMPKIN, J. delivering the opinion.

[1 and 2.] We see no error in refusing a new trial on the first and second grounds in the motion. If it be proven that the general plan of a parent is to loan, and not give slaves to his children when they marry or settle in life, it tends to rebut the presumption of a gift, arising from the fact, that certain negroes were permitted to go into the possession of a daughter upon her intermarriage, or at some subsequent

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time. Here it is not pretended that a formal gift was made of the negroes.

Not allowing parol proof to be made, that he had given *land* to two of his sons, does not rebut the proof as to the *slaves*. Besides, the record shows that the title to the *real estate* is now in litigation.

[3.] We do not know that more need be said, as to the proper conduct of counsel in arguing causes. We find it difficult to confine them to the record in this Court, and it is more difficult we doubt not in the Court below. For there, it is not always agreed as to what has or has not been proven; there may be an honest mistake as to that, while here it is a matter of record, about which there need be no misapprehension. To depart from the testimony, much more, voluntarily to pervert or misrepresent or add to it, is a great wrong; and to say nothing worse, it leads to those unseemly altercations which so seriously disturb the decorum and dignity of Courts. For myself, I envy not the success of those who achieve their triumphs in this way. I intend this as a general remark, and not for the counsel in this case.

4th, 5th, 6th, 7th. These four grounds may be considered and disposed of together. If the title by which Lockett held these slaves is a loan, and not a gift, then the verdict is not contrary to law; otherwise it is. For myself, I am free to admit, that in my judgment, the weight of the proof is against the verdict, and yet not perhaps so strongly and decidedly so, as to compel this Court to control the discretion of the Circuit Judge, in refusing a new trial.

8th. The witness, Chas W. Mims, begins his statement, by saying, "It was my understanding," &c. It is obvious from what follows, that he is testifying as to his knowledge or recollection of the facts and circumstances which attended the transfer of the possession of the slaves from his father to his brother-in-law. He does not intend to recite what

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he had heard or learned from others. It is the common mode of expression in use in the country.

9th. As to the 9th, and last exception, to the decision of the Court ruling out the evidence of Charles W. Mims, as to what was said and *not said*, by his father and himself, when he was about removing certain slaves, it amounts to nothing; and was properly excluded on the ground of immateriality. It was equally consistent with the idea of a loan or a gift.

Judgment affirmed.

McDONALD, J. absent.

EDWARD HARRIS, plaintiff in error, vs. **JNO. R. DYER**, executor, defendant in error.

It is entirely competent for the Legislature to prescribe the mode by which the public domain shall be disposed of by the State; and if the law directs only a certificate to issue to the purchaser, as the evidence of his title, it is equally sacred as a grant.

A grant to land, the sale of which was not only not authorized by law, but suspended from the operation of the act under which it was sold, is void; and it is competent to make proof of this fact.

Ejectment, in Lee Superior Court. Tried before Judge **ALLEN**, at September Term, 1858.

This was an action of ejectment by the lessee of John Rawls and John R. Dyer, executor of Anthony Dyer, deceased, against Richard Roe, casual ejector, and Edward Harris, tenant in possession, for the recovery of lot of land, number one hundred and twenty-nine, in the thirteenth district of Lee, containing one hundred and seventeen acres.

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Plaintiff upon the trial, offered in evidence the following certificate, having proved the same to be genuine, and the signature thereto to be in the handwriting of William J. Davis, agent for the Central Bank of the State of Georgia, viz: GEORGIA, PULASKI COUNTY.

In pursuance of an Act of the General Assembly of the State of Georgia, passed on the 23d day of December, 1833, entitled "An Act, to alter and amend the tenth section of an Act, passed 19th December, 1829, in relation to the Central Bank of Georgia, and to provide for the sale and disposition of lands forfeited to the State," I, William J. Davis, agent of the Central Bank of Georgia, do hereby certify, that on the 5th day of May, 1834, number one hundred and twenty-nine, containing one hundred and seventeen acres, lying and being in the thirteenth district of Lee county, was set up and exposed to public sale in the town of Hawkinsville, according to the provisions of the before recited Act, when John Rawls, being the highest bidder, became the purchaser thereof, at the price of twenty-seven dollars. And I do further certify, that the said John Rawls has paid nine dollars, it being one-third part of the purchase money aforesaid, and that there remains to be paid to the Central Bank of Georgia, to complete the said purchase, the sum of eighteen dollars annually, for two years from this date.

(Signed,

WM. J. DAVIS, Agent."

Upon which certificate was endorsed the following credit, in the handwriting of the said William J. Davis:

"CENTRAL BANK OF GEORGIA,

Milledgeville, May 21, 1835.

Received eighteen dollars in full payment of the within certificate.

WM. J. DAVIS, Teller.

Also the following assignment:

"I transfer the within certificate to Anthony Dyer for value received.

(Signed,

JOHN RAWLS."

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It was admitted that John R. Dyer was the executor of Anthony Dyer, and that the defendant Edward Harris, was in possession of the land in dispute, at the commencement of the action.

Here plaintiff rested.

Defendant offered and read in evidence, a grant from the State of Georgia, to G. Ticknor and Matthew Williams, for the land in controversy, dated 11th July, 1850: Said grant recites "that in pursuance of an Act of the General Assembly of this State, approved 26th January, 1850, authorizing the Governor to direct grants to issue to the *bona fide* owner of any square lot or fraction which was suspended from the operation of the Act approved 30th December, 1847. (upon certain conditions in said Act,) I have given and granted, and by these presents in the name and behalf of this State, do give and grant unto G. C. Ticknor and Matthew Williams, of the county of Lee," &c.

It was admitted that Harris, the defendant, had a regular chain of title from the grantees, and that he was a *bona fide* purchaser for valuable consideration, without notice of any outstanding title in plaintiff.

Plaintiff, in rebuttal, offered in evidence a copy certificate of the purchase of fraction number one hundred and twenty-nine, in the 13th district of Lee county, and the entries thereon, made by the Sheriff of Lee county, in which it is certified, that said Sheriff, under the provisions of an Act passed 30th December, 1847, on the 1st day of May, 1849, sold at public sale, fraction number one hundred and twenty-nine, in the thirteenth district of Lee, to George C. Ticknor and Matthew Williams, for the sum of fifty-one dollars, and that said purchasers shall receive a grant for the same upon the condition that they pay to Charles H. Rice, the agent of the State, one-third of the purchase money in cash, and the remaining two-thirds in equal installments, together with the sum of three dollars grant fees, &c.

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Upon this copy certificate was endorsed the following entries:

"Received of George C. Ticknor and Matthew Williams, the purchasers of fraction number one hundred and twenty-nine, in the 13th district of Lee, seventeen dollars, the same being the cash payment on said fraction. 1st May, 1849.

(Signed,) CHAS. H. RICE, Agent."

"TREASURY DEPARTMENT, GA.,
Milledgeville, 11th July, 1850.

§34. Received of George C. Ticknor and Matthew Williams, purchasers, thirty-four dollars, the balance of purchase money in full, for the within described fraction, as per certificate No. 254, of this date.

(Signed,) WM. B. TINSLEY, Treas'r."

"EXECUTIVE DEPARTMENT,
Milledgeville, July 11, 1850.

Let a grant issue to George C. Ticknor and Matthew Williams, of Lee county.

By the Governor.

B. F. GULLET, S. E. D."

To the introduction of this certificate and entries, defendant objected, on the ground that said certificate tended to contradict the grant, and that the grant being valid upon its face could not be attacked collaterally.

The Court overruled the objection and admitted the certificate, and counsel for defendant excepted.

There being no controversy as to the facts, the jury under the charge and direction of the Judge, found for the plaintiff, and counsel for defendant excepted.

SLAUGHTER & ELY; and HAWKINS, for plaintiff in error.

VASON & DAVIS, contra.

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By the Court.—LUMPKIN J. delivering the opinion.

The conflict of title in this case is between a certificate of purchase, made of the sale of the lot of land in dispute by the Central Bank, under the Act of 1833, (*Cobb*, 131,) and a grant purporting to issue under the Act of 1850. (*Cobb*, 714.)

The former being prior in point of time, will of course be preferred, unless there be some law to prevent.

It is contended that the certificate must yield to the grant. Why? Is it not competent for the Legislature, to direct the mode by which titles to the public domain, shall be conveyed by the State? And if the Legislature has not prescribed the issuing of a grant, in order to convey lands sold by the Central Bank, is not the authentication of the purchase by certificate, as complete as if made by grant? We see nothing to contravene this conclusion. And such was the decision of this Court in the case of McLeod and Dyer, decided at this place, six months since, and not yet published.

But by the certificate of the Surveyor General of the State, the introduction of which as testimony was objected to, but which we hold was properly admitted, it turns out that the grant instead of being made, suspended from the operation of the Act of 1847, was issued on the sale of this lot, under and by virtue of that very Act. And by inspection of the statute, it is evident that it was misconstrued by the Governor; and that it gave no authority to sell this land. *Cobb* 709.

Besides, the Act of 1850, (*Cobb* 714,) did not authorize a grant to issue to land sold under the Act of 1847, as this lot was; but on the contrary, it directed grants to issue to the *bona fide* owner of square lots or fractions, which were “*suspended* from the operation of the Act of 1847.” There is no authority therefore to issue this grant, there having been none to sell the land.

If grants cannot be attacked in this State, either by *scire facias*, or by bill in chancery, filed directly for that purpose

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perhaps more latitude should be allowed to impeach them collaterally and by *aliunde*, or rather outside proof. The General Assembly has passed an Act, authorizing mistakes in grants to be proven by parol at law. This is, I was going to say, a step, but it is more, a *stride* in the direction indicated. And it is the duty of Courts to follow the lead rather than struggle to check and restrain the expression of the popular mind, as to any matter of public policy. By doing so, they keep the popular will under wholesome control. Whereas, by a different course, it overleaps all bounds, and in its wantonness sweeps away much that should have been preserved.

McDONALD J. absent.

HENRY P. WOOTEN, adm'r, &c., plaintiff in error, vs. GRIF-
FIN SMITH, et al., defendants in error.

While any material allegation, constituting the equity of the bill, remains unanswered, the injunction will not be dissolved.

New matter introduced in the answer, and not responsive to any charge in the bill, should not be considered, on a motion to dissolve an injunction.

In Equity, from Lee county. Decision by Judge ALLEN,
at December Term, 1858.

Elizabeth D. Johns, executrix of the last will and testament of Enoch Johns, deceased, filed this her bill against Griffin Smith, William M. Petty, and Samuel Lindsey, Sheriff of Lee county, seeking to set aside a sale by said Sheriff, of a lot of land belonging to the estate of her testator, and to enjoin said Sheriff from executing a deed of conveyance

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of the same to Smith and Petty, and from dispossessing complainant from said premises.

The bill states, that Enoch Johns, complainant's testator, with others, on the 3d day of August, 1852, became the surety of one Edward Sessions, Tax Collector of said county. That on the 21st February, 1857, the Inferior Court of said county, sitting for county purposes, had judgment entered against the said Sessions and his sureties, on the official bond, for the sum of \$344 19, besides interest at the rate of twenty-five per cent. per annum. Said judgment was entered up against complainant and Thomas H. Moody, executrix and executor of said Enoch Johns, as well as the other sureties, although no notice thereof had been given to them, that said judgment would be entered. That by virtue of the *fieri facias* issued upon said judgment, the Sheriff levied upon a negro, the property of Joseph S. Cross, one of the sureties, and a defendant in said *f. f.*; but before the sale of said negro, Cross satisfied the execution, as complainant was informed and believed, by giving credit for the amount due thereon, on a demand which he, Cross, held against the county.

The bill further states, that afterwards, Cross having control of said execution, directed the same to be levied on the property of his co-surety, complainant's testator, and the Sheriff, in pursuance of said direction, came to the residence of complainant, and informed her that if she did not pay off said execution, he would levy the same upon the lot of land on which she resided, the same being part of the estate of her testator; that she replied, "that if he had to levy on land, to levy on the Huckabay lands belonging to said estate." That the Sheriff, in disregard of the wishes and rights of complainant, levied said execution on the lot of land whereon complainant resided, and on which were all the houses and improvements of the settlement, and in the middle of the plantation, and advertised the same to be sold on the first Tuesday in January, 1858, without referring to the improve-

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ments or situation of said lot, and that said Sheriff failed to notify complainant of the levy so made. That said land was sold by the Sheriff on the 5th January, 1858, and bought by the said Griffin Smith, for the sum of five hundred dollars, and said land was worth two thousand dollars.

The bill further charges, that said Sheriff and William M. Petty were interested with Smith in the purchase; that no payment has been made by Smith to the Sheriff of the purchase money, nor any conveyance of the premises executed to him.

The bill was sworn to, and the injunction issued as prayed for.

Complainant was dismissed, after the filing of the bill, from her executorship, and Henry P. Wooten appointed administrator *de bonis non cum testamento annexo*, and made the party complainant.

After Wooten's appointment as administrator, &c., he amended the bill, stating and charging that said sale by the Sheriff was void, for the reason that said judgment and *fa. fa.*, under which said sale was made, being against Moody and Mrs. Johns, as executor and executrix, and they having a large amount of other assets in hand, could not be levied upon the real estate of testator.

The amendment further tendered to Smith and Petty the full amount paid by them to the Sheriff for said land, and interest thereon.

The bill as amended further states, that the complainant, Wooten, should not be dispossessed of said premises, which have come into his possession, as administrator, *de bonis non*, &c., since said sale, by virtue of appointment to such office by the Court of Ordinary, and the Sheriff's right to dispossess having been waived, abandoned and abrogated, by virtue of a subsequent agreement between Mrs. Johns and the purchaser, and under which agreement she was holding possession when dismissed from her executorship as aforesaid, as appeared by defendants' answers.

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And further and lastly the bill prayed, that said Smith and Petty should receive the amount paid by them for said land, and deliver up the conveyance executed to them by the Sheriff, and that they be perpetually enjoined, &c.

The answer of Lindsey, the Sheriff, admits the death of Enoch Johns, his securityship to the Tax Collector, and the judgment and execution on the official bond, as stated in the bill, but denied that Cross ever paid said judgment, or any part thereon, but admits that he went to Cross to make a levy; that he made some objection to it, and that there was an understanding between them that a negro boy should be levied on, but he was never sold. Knows nothing of any payment made by Cross on said judgment, or of his having any claim to the same.

The answer further states, that before said levy was made on the land, he had levied on the same by virtue of another *fl. fa.* against the executor and executrix of said testator, which was destroyed by the burning of the court-house. Said levy was made in the summer of 1857, and advertised, and on the promise of complainant to pay off the same, the sale was postponed. The money was not paid; and when the last levy was made, complainant was informed that she must pay both *fl. fas.*, as the land would be advertised for sale under both levies, and that the advertisement set forth as an exhibit to the bill, is a true copy of the original. Admits that the land was sold at the time stated in the bill, and bought by said Smith and Petty for \$515, but denies all and any agreement, understanding or combination between himself and Smith and Petty, or that he had any interest in said sale, or that there was any fraud or concealment about the matter; but avers that said sale was fair and *bona fide*; that Smith and Petty have paid the purchase money, and that too in complainant's presence, and at her house. That it was agreed between complainant, and Smith and Petty, after the sale, that complainant was to retain possession until the Monday after the sale, and if by that time she would

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pay the amount paid by them for the land, that the title should be made to her. That the execution of the conveyance to the purchasers was delayed until after the said period, but he soon thereafter made to them said conveyance, on being informed that complainant had failed to pay said money.

Smith and Petty answer, that they know nothing of the matters stated in the bill up to the time of the sale, and as legal, innocent purchasers, insist upon strict proof of all the allegations and charges affecting their rights. They admit they purchased the land; that the same was sold under two *st. fas.* They deny that the Sheriff had any interest in said purchase, or that the same was fraudulent; and deny all combination, but that they bought said land in good faith, at a legal sale, as the highest bidders, and are innocent purchasers; that they paid the purchase money in complainant's presence, and at her house. They admit that the Sheriff's deed was not made until the next week after the sale, but deny that this was by virtue of any agreement before or at the sale.

Upon the coming in of the answers, and upon a rule to show cause, the Chancellor dissolved the injunction, upon the ground that all the equity of the bill was sworn off; to which decision counsel for complainant excepted.

VASON & DAVIS; G. J. WRIGHT, for plaintiff in error.

MCCAY & HAWKINS, *contra.*

By the Court.—LUMPKIN, J. delivering the opinion.

Our conclusion is, to hold up the injunction in this case, until the hearing of the bill. Samuel Lindsey, the Sheriff, has not accounted for the negro levied on by the execution. And until that is done, the presumption of law is, that the *st. fa.* was satisfied before it was levied on the land. And if that be so, the purchasers could derive no title from the sale.

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The Sheriff admits that he *levied* on the negro, but says he did not *seize* him. Why he did not, and what became of him, and why he was not sold, does not appear. We infer that he left him with Cross, the defendant, whose property he was. That does not discharge the Sheriff.

As to the other small execution under which, it is alleged in the answer, the land was also sold, this is altogether new matter, and not responsive to any charge in the bill. And consequently, should not have been considered in determining the motion to dissolve. If true, it will be very material upon the hearing.

Judgment reversed.

McDONALD J. absent.

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ROBERT S. HARDAWAY, plaintiff in error, vs. **ALLEN B. DRUMMOND, et al.**, defendants in error.

A recovery by or against the heirs at law, may be pleaded in bar to a suit brought by the administrator of the estate for their benefit, there being no debts due or owing by the intestate.

In Equity, from Muscogee county. Decision by Judge WORRILL, on demurrer, at May Term, 1858.

This case was before the Supreme Court at Macon, January Term, 1857, and the facts will be found fully stated in *21st Ga. Rep.* 433.

The defendant met the bill, in the first instance, with a demurrer on three grounds. 1st. For want of equity. 2d. For want of proper parties complainants—that the legal representative, and not the heirs at law, of the idiot, alone had

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the right to call defendant to an account. 3d. For multifariousness.

The Court below sustained this demurrer and dismissed the bill, which decision, upon error assigned, was reversed by the Supreme Court. (See 21 *Ga. Rep.* 433.)

The case being remanded, came up again for a hearing in the Court below, when defendant again demurred to the bill, 1st. For want of equity. 2d. Multifariousness, and 3d, for want of the proper parties defendant—insisting that the representative of William F. Drummond, deceased, should be made a party.

The Court overruled the demurrer, and defendant excepted and assignis error.

It is proper here to state, that after the case was remanded to the Court below, under the judgment of the Supreme Court, complainants amended their bill, stating, as a reason why the representative of the estate of William F. Drummond was not made a party to the bill, that said William F. had no interest in said cause, having never received any money or other thing belonging to said idiot; but having, while living, and more than a quarter of a century ago, been sued by Robert S. Hardaway, the defendant, as a mere irresponsible instrument, to enable defendant to retain in his hands the estate of said idiot. And further, that said Wm. F. Drummond is not made a party, because he departed this life more than twenty years before the filing of the bill, totally insolvent, leaving no estate of any value, and no administration was ever taken out. That said William F. died in 1832, and if he left any estate, the same has long since been distributed, without notice of any claim by the said Robert S. Hardaway, who was, before or at the time of his death, and for many years thereafter, the only party entitled, and whose duty it was to give such notice, and sue for and recover said claim if any existed; and that all remedy, if any ever existed, against the said William F. Drummond or his estate, has long since been barred by lapse of time; and this in conse-

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quence of the default and negligence of said defendant guardian of said idiot.

It was to this bill, as thus amended, that said last mentioned demurrer was filed.

DOUGHERTY, for plaintiff in error.

HOLT & HUTCHINS, represented by B. HILL, *contra*.

By the Court.—LUMPKIN J. delivering the opinion.

This case has been up before, (see 21 *Ga. Rep.* 433,) and the only new point presented is, that the administrator of Wm. F. Drummond, with whom it is alleged the defendant fraudulently settled for the property of the idiot, is not made a party to the bill.

Wm. F. Drummond died many years ago. He is unrepresented, and his estate is insolvent. Why make his administrator a party? It is argued that the protection of Robert S. Hardaway requires this to be done. Otherwise, an administrator might, at some future time, be appointed, who might recover this property.

The heirs of the idiot are the complainants in the bill; and a decree against them could be pleaded in bar of any suit brought by an administrator for their benefit—there being no debts owing by the idiot. This Court has often recognized and enforced this doctrine, in attempts which have been made to recover property indirectly through the representative of an estate, for the benefit of the heirs, when the heirs themselves were barred.

Judgment affirmed.

Taylor & Co. vs. Hughes.

**F. C. TAYLOR & Co., plaintiffs in error, vs. JAMES M. HUGHES,
defendant in error.**

Notice is given by an insolvent debtor to his creditors, that he will apply at the next Term of the Superior Court for an order, appointing a time to hear his application for a discharge. At the Court, he moves to take the oath, the creditor by his counsel being present, making no complaint that he is surprised by the form of the notice, and on that account asking for time to show cause against the motion.

Held, That the law has been substantially complied with. And further, that our insolvent laws are to be liberally construed in favor of liberty.

Discharge under Honest Debtors' Act. Decision by Judge BULL, at May Term, 1858, of Muscogee Superior Court.

James M. Hughes applied at this Term of the Court to take the benefit of the Act for the relief of honest debtors. Among the creditors to whom he alleged he gave notice, under the provisions of said Act, were F. C. Taylor & Co.

When the case was called, and a motion made to admit Hughes to take the benefit of said Act, F. C. Taylor & Co. objected, until Hughes should prove that due notice had been given to them of said application.

Whereupon, Lemuel T. Downing, Esq., was called to the stand, who testified that he, as attorney for F. C. Taylor & Co. had received no notice of said application, other than the following, which he read:

“**GEORGIA, MUSCOGEE COUNTY,**
To Lemuel T. Downing, attorney at law for F. C. Taylor
& Co., one of my creditors.

You are hereby notified that I will apply to the honorable Judge of the Superior Court for said county, on the second Monday in May next, to make a rule or order, and assign a day in said rule or order, that I may be brought before said Court, for the purpose of taking the oath prescribed for insolvent debtors, and to be discharged. April 2d, 1858.

(Signed)

JAMES M. HUGHES.”

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The applicant then renewed his motion to take the oath and be discharged. To which motion Taylor & Co. objected, upon the ground that they had not been served with such a notice as the Act of 1823 required, (no objection was made to the mode of service,) and that they should be discharged as parties to said proceeding. Which motion the Court refused, holding that the notice was sufficient to make Taylor & Co. parties, and counsel for Taylor & Co. excepted.

The names of F. C. Taylor & Co. were then, by order of the Court, inserted in the record of the cause, among other creditors, as having been duly notified of said application, and Taylor & Co. excepted.

And thereupon said Hughes, (Taylor & Co. objecting,) was allowed by the Court to take the oath and be discharged, as provided by Act of 1823. To which also counsel for Taylor & Co. excepted; and thereupon tendered their bill of exceptions, assigning as error the foregoing decision and orders.

L. T. DOWNING, for plaintiff in error.

RAMSAY & CARITHERS, *contra*.

By the Court.—LUMPKIN J. delivering the opinion.

The complaint in this case is, that the debtor gave notice, in terms of the Acts of 1801 and 1809, that he would apply to the Court, at its next Term, for an order appointing a time to hear the application of the insolvent for his discharge; and that consequently, he was not entitled to move *instanter* to take the oath, under the Act of 1823.

When the case was reached, and called in its order, the debtor moved to be admitted to take the benefit of the Honest Debtors' Act. The creditor had received ample notice, and was present by his counsel in Court. He did not ask for time, or the appointment of a future day, to file objections to the application. If he had, and stated that he was sur-

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prised by the form of the notice, and by reason thereof was not prepared to contest the motion, or show cause against it, time no doubt would have been allowed for that purpose.

The law, we think, has been substantially complied with. And the insolvent debtors Acts should be liberally construed in favor of liberty.

Judgment affirmed.

WILLIAM J. REESE, et al., plaintiffs in error, vs. JOHN W. SHEPHERD, executor, defendant in error.

The second original of a declaration against two persons, was served only thirteen days before Court.

Held, That the suit became a nullity, under the 8th section of the Judiciary Act of 1799.

Complaint, in Sumter Superior Court. Decision by JUDGE ALLEN, at September Term, 1858.

This was an action by John W. Shepherd, executor of Andrew H. Tarver, deceased, against William J. Reese, of Sumter county, and William M. Brown, of the county of Marion, on a promissory note.

The original petition was filed in the office of the Clerk of the Superior Court, February 17th, 1857, and process issued, requiring the defendants to appear at the Superior Court in and for the county of Sumter, on the second Monday in March next, thereafter; Reese was served on the 21st February, 1857, by the Sheriff of Sumter county. The second original for Marion county issued, and was served on Brown the 24th February, 1857.

The Superior Court of Sumter county, to which the defendants were required to appear, commenced its session the

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9th March, 1857, and service on Brown, was therefore only thirteen days before the Court to which the suit was returnable.

At September Term, 1857, plaintiff took a verdict and entered up judgment, upon which a *fit f'a.* was issued, and levied on the property of Reese, who filed an affidavit of illegality on the ground, that Brown, his co-defendant was not served in time. The Court sustained the illegality, but held that the writ was returnable to September Term, 1857, and passed an order, that the verdict and judgment be set aside, and the case stand for trial at September Term, 1858.

At this, the September Term 1858, defendants moved to dismiss the action, on the ground of want of service in time as above stated.

The Court refused the motion, and plaintiff had a verdict, and defendants excepted.

McCAY & HAWKINS, for plaintiff in error.

L. R. REDDING, *contra.*

By the Court.—BENNING, J. delivering the opinion.

The Statute says, “And if any such process shall be delivered to the Sheriff, or other officer, whose duty it shall be to execute the same, so late, that it cannot be served in manner aforesaid, twenty days before the sitting of the Court to which it shall be returnable, such process shall not be executed, but the officer shall return the same with the truth of the case.” *Pr. Dig.*, 420.

Shall not be executed—these are the peremptory words of the Statute.

The Statute, then goes on to say, that “all process issued and returned in any other manner than that” therein before “directed shall be” “null and void.”

These latter words, then, apply to this case, and when they do apply to a case, they render the whole proceeding a nulli-

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ty. So it has ever been held. See *Ingram vs. Little*, 16 Ga. Rep., 194.

This case is much stronger than that, for in this, there was no appearance by the defendants.

But I must say, that, I think, if there is one Statute that needs amendment, it is this one in relation to the issue and return of process.

We regret being compelled, as we think, we are, to reverse the judgment.

Judgment reversed.

McDONALD J. absent.

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PLEASANT J. PHILLIPS, executor, plaintiff in error, vs. WILLIAM H. LAMAR, late Sheriff, defendant in error.

If a Sheriff collect money, and of his own accord deposits the money in a Bank which fails, he is liable to respond to the plaintiff.

Rule against Sheriff, from Muscogee county. Decision by JUDGE WORRILL, at November Term, 1858.

This was a rule against William H. Lamar, late Sheriff of Muscogee county, to shew cause why he should not pay to the plaintiff the amount due on a *f. & f.* placed in his hands, at the suit of Pleasant J. Phillips, Executor of H. H. Lowe, against Alfred Iverson.

Lamar answered, that he collected the money, and on the same day deposited it in the Manufacturers and Mechanics Bank of Columbus, a chartered Bank, then doing business, and in good credit ; that he kept his bank account of deposit at said Bank ; that said money remained on deposit to his credit as Sheriff, ready to be paid to the plaintiff upon call or demand,

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and that before said call or demand was made, said Bank failed, and the money now remains on the books of said Bank, to respondent's credit, and he offers to give to plaintiff a check upon said Bank for the same, or assign the same to him.

The amount received by the Sheriff, was \$949 59, in full of principal, interest and cost, 29th August, 1856. The Manufacturers and Mechanics Bank failed on the 2d November, 1856.

This rule was issued from, and heard by the Inferior Court, which Court discharged the same; to which decision, counsel for Phillips excepted and sued out a *certiorari* to correct and reverse said order.

Upon hearing the same, the presiding Judge of the Superior Court, (Worrill, J.) dismissed the *certiorari*, and affirmed the judgment of the Inferior Court, and counsel for Phillips excepted to said decision, and assigns the same as error.

R. W. DENTON, for plaintiff in error.

WILEY WILLIAMS, *contra*.

By the Court.—McDONALD, J. delivering the opinion.

The law makes the Sheriff the collecting officer under final process of the Courts, and it holds him liable to a stringent and summary liability. If he fails to do his duty according to the exigency of the process in his hands, the plaintiff is not compelled to resort to the tardy remedy of an ordinary suit, but he may proceed against him by rule, as for contempt, and coerce the payment of the money instanter, which he ought to have in Court, and would have had, but for his misconduct.

The strictness of the law as enacted by our Legislature, and as enforced by our Courts in regard to Sheriffs, grows out of the important relations which that officer sustains to the community, as the executor of the final judgment of the law. The interests of every litigant who obtains a judgment

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in the Court, must necessarily be committed to his hands, if the judgment cannot be otherwise enforced than through the use of the process of the Courts. The Courts of Georgia had ever held (prior to the passing of the act of 1839 to make valid certain bonds, *Cobb*, 534 and 535,) where I have practiced before the establishment of this Court, that contracts made by Sheriffs with defendants, whose property had been taken in execution, for leaving the property executed in their hands, were void for ease and favor, as being against the policy of law. The Acts referred to validates contracts as between Sheriffs and other officers named therein, and defendants made for the above purpose ; but such contracts it is expressly declared, shall not affect the rights of plaintiffs, or their remedies against Sheriffs and other officers.

This act expresses strongly the Legislative mind, that private arrangements made by Sheriffs, who are officers of the law, with defendants whose property they may have levied on, for the forth-coming of the property, shall not prejudice the interest of plaintiffs. It certainly cannot be held that contracts or arrangements in regard to the money by Sheriffs, after it is in hand, by means whereof it is exposed to loss, and ultimately lost, can be allowed to exonerate them from liability and throw the loss on plaintiffs. The process requires them to have the money in Court, and after having collected it, nothing but inevitable accident can relieve them from liability. The Sheriff had collected the plaintiffs money, and without authority from him, and of his own accord, had placed it on deposit in bank as Sheriff. It was put in bank on general deposit. Such a deposit creates the relation of debtor and creditor, between the bank and the depositor. It is not a bailment, for the bank has a right to use the deposit as its own money, and is liable to pay on demand, and no interest accrues but from the time of demand and refusal to pay. It is a loan. In the case of *Brown vs. Hanford*, 5 *Hill's Rep.* 591, it was held that the Sheriff after levying on the goods of a defendant, and having deposited them with a

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person solvent and responsible, who received them to him for them, was not liable, the goods having been casually burnt, and without fault. The solvency of the receptor was not questioned. Judge Cowen, in delivering his opinion seems to have thought, that if there had been any doubt of the ability of the receptor of the goods in that case, the determination would have been different, and remarks very truly, that the Sheriff was under no obligation to deliver over the goods, and must see at his peril, that the substituted security be available. And, again, "it is of the nature of every trust, that when the trustee parts with the fund, and takes a substituted security, he is guilty of a conversion and must answer at all events." It is difficult to perceive on what principle the *case* was decided, as it was.

I will remark that it cannot be recognized as law here. Our statute, which authorizes Sheriffs to take bonds for the forthcoming of property on the day of sale, but holding the Sheriffs, nevertheless, liable to plaintiffs, if the property should not be produced, forbids it. I repeat, I do not see how the case can be supported on principle. It seems to me that the analogies referred to, are not apposite, and are therefore, not good authority for it. The case of a factor *del credere* is not the case of a public officer, on whose faithful conduct the whole community are *forced* to rely for the attainment of their rights through the Courts, and a receiver is a special officer of a court of Chancery.

A man has a choice in the selection of a factor, but not so of a Sheriff; and a receiver is under the order and control of the Court to which he owes his appointment, and is accountable as that Court shall order and direct. If a Sheriff can excuse himself, by delivering over property taken in execution by him to the custody of an individual of ability to pay for it, if it be not forthcoming to answer the plaintiffs demand, and it be casually lost, plaintiffs are subjected to injury and loss at the hands of those in whom the law does not require them to confide. But the same learned Judge, whose

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remarks I have already quoted, says that "no case goes the length of saying that, if the goods be destroyed without any fault of the Sheriff, the plaintiff shall not be entitled to sue out a new execution, or the Sheriff to make a new levy." I would say it would be an extremely hard case for the defendant to be subject to a second levy, and of consequence, to a second payment of the debt, if his property sufficient to satisfy it had been taken in execution and lost or destroyed without his fault. I cannot regard that as sound law.

Sheriffs cannot force on plaintiffs the risk of the solvency of any bank in which they may choose to deposit money which they collect. That risk is their own. There are not banks in every county where Sheriffs may deposit money collected by them. If a Sheriff in a city may loan money collected by him to a bank, and every general deposit is a loan, a Sheriff in the country may loan to an individual in good credit at the time, and if the failure of the bank should excuse the city Sheriff, the failure of the individual ought to protect the country Sheriff. This Court cannot countenance or affirm a rule, apt to operate so injuriously to plaintiffs. The Sheriffs will run but little risk if they make the plaintiffs or their attorneys the depositories of their own money, which may generally be done with the slight inconvenience of notifying them by mail or otherwise, that the money is collected and ready to be paid.

Judgment reversed.

Hargraves, adm'r vs. Jones.

GEORGE HARGRAVES, adm'r, Plaintiff in error, vs. SEABORN JONES, defendant in error.

[1.] It is too late, when a cause is called for trial on the merits, for the defendant to move to dismiss a bill, because the complainant has an adequate common law remedy, the answers all being in and no demurrer filed.

[2.] If the answer admits the equity in the bill, or what is alleged as equity, and alleges such matter, as, if proven, would defeat the complainant's equity, which matter is not strictly responsive to the bill, this Court will not control the discretion of the Chancellor below in retaining the injunction.

In Equity in Muscogee Superior Court. Decision by JUDGE WORRILL, at May Term, 1858.

This was a bill filed by Seaborn Jones against James H. Shorter, administrator of Eli S. Shorter, deceased.

The bill states that one George W. Dillingham, late of Muscogee county, in said State, departed this life intestate, possessed of a considerable estate, and that letters of administration thereon were granted to John Dillingham, and that complainant and Eli S. Shorter became his securities; that Shorter died in 1836 intestate, and James H. Shorter and Sophia Shorter were appointed his administrator and administratrix, but that James H. Shorter took upon himself the principal management and control of the affairs and assets of said estate.

The bill further states that the Farmer's Bank of Chattooga instituted suit, and recovered judgment against the said George W. Dillingham, administrator as aforesaid, for two thousand five hundred and ninety-five dollars and seventy-eight cents, (\$2595 78) besides interest, and finding no property of said Dillingham out of which to satisfy said judgment, said Bank, after Eli S. Shorter's death, instituted suit in the name of the Inferior Court, as a Court of Ordinary, against said Dillingham and complainant, upon the administration bond, to recover the amount of said judgment; and at April Term, 1838, of the Superior Court of said county, recovered judgment against said Dillingham and

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complainant, as survivors as aforesaid, for \$2595, as principal, and \$725 58 interest.

The bill further states that said judgment, although nominally for the Farmers' Bank of Chattahoochee, was really for the benefit of Alfred Iverson, who was alone beneficially interested therein, and that Iverson has received upon said judgment out of the property of George W. or John Dillingham, or both, the sum of \$760 00, and that complainant paid on said judgment the sum of \$2230 on 7th October, 1851, leaving a balance due at that time on said judgment of about \$1057 60. That since the payment above stated by complainant, Iverson, on the day of 1852, transferred said judgment to James H. Shorter, receiving from Shorter the bills of the Central Bank of Georgia, (as complainant has been informed and believes) which bills were at a discount of twenty or twenty-five per cent.

The bill further states that John Dillingham is insolvent, and out of the State, and that James H. Shorter intends to collect the balance due on said judgment out of complainant, who was only a security with Eli S. Shorter, deceased, and who would have been sued thereon with John Dillingham and complainant, had he been in life at the time suit was brought. That James H. Shorter, administrator of Eli S. Shorter, deceased, has a large amount of assets in his hands, more than sufficient to pay said balance due on said judgment, and had at the time he purchased said judgment from Iverson ; and that complainant has paid more than one-half of said judgment, and if the balance is now collected from him, he will be driven to the trouble and expense of commencing suit against the said James H. and Sophia Shorter, administrators of Eli S. Shorter, deceased, and delayed in the recovery back of the money thus paid, or to be paid by him.

The bill prays that said James H. Shorter, as the principal acting administrator of Eli S. Shorter, deceased, may charge up the balance due on said judgment to the estate of his in-

Hargraves, adm'r vs. Jones.

testate, and to contribute to complainant what is due to him in the premises, and to relieve and discharge him from all further liability on said judgment, &c. There was also a prayer that defendant be enjoined from all further proceedings under said judgment and execution, until the further order and decree of the Court.

The bill was read, sanctioned, and an injunction ordered at chambers, 25th April, 1844.

The answer of defendant admits that Dillingham died about the time stated in the bill, that administration was granted on his estate, and bond and security given as therein stated; that Eli S. Shorter died, and defendant and Sophia S. Shorter, administered upon his estate, and that defendant took upon himself the principal burden of said administration, and managed and controlled most of the assets—admits the recovery of the judgment as stated in the bill, and the payments thereon from the property of Geo. W. Dillingham, and by complainant, and that the said judgment and *fr. fa.* were assigned to defendant by Iverson 5th July, 1842, and that there was then due on said judgment a balance of \$1117, or thereabouts—admits that he paid Iverson in Central Bank bills in part, which he received at par, being indebted to said Bank; that he purchased said judgment on his individual account, and paid for the same out of his own funds, and not out of the funds of the estate of Eli S. Shorter; that the transfer thereof was made to him individually—admits that John Dillingham is insolvent, and has moved from the State, and that it is the intention of defendant to collect the balance due on said judgment out of complainant—admits that Eli S. Shorter, as co-security, would be liable for one-half of said judgment, provided Jones had paid the same, and had not been indemnified by the estate of Dillingham—denies that he has assets in hand, or had at the time he bought said judgment, belonging to the estate of Eli S. Shorter, sufficient to pay the same, or any part thereof; but alleges that he has fully administered and paid out all

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the funds that have come to his hands, and that there are still outstanding debts against said estate not paid, and denies his liability to complainant in this form of proceeding ; charges that Jones has received from John Dillingham, administrator as aforesaid, cash and notes and other property amounting to ten thousand dollars, as an indemnity against his suretyship on said bond.

At November Term, 1848, the death of James H. Shorter being suggested of record, George Hargraves, his administrator, was made a party defendant.

At May Term, 1857, complainant amended his bill, charging that said James H. Shorter knew that his intestate Eli S. Shorter was the co-security with complainant on John Dillingham's administration bond, and that said John Dillingham was in failing circumstances, and would not be able to account for the assets of George Dillingham, which had come into his hands as administrator, and that complainant, and Eli S. Shorter's estate would have to respond, as his sureties, to the creditors and distributees of George Dillingham, deceased.

Complainant, in his amended bill, further charged that a large amount of assets of the estate of Eli S. Shorter came into the hands of James H. Shorter; more than three hundred thousand dollars, and that said James H. well knowing his intestate's liability on said bond, paid to creditors of said estate debts on open accounts amounting to one hundred thousand dollars or other large sums. That there was a valuable brick dwelling house in the city of Columbus belonging to Eli S. Shorter at the time of his death, and many negroes, which came into the possession of James H. Shorter, his administrator, worth \$25,000, or other large sum, and were in his possession at the time he bought said judgment ; that he received large sums from other sources which he paid out and distributed among the heirs at law, after he purchased said judgment, and much more than sufficient to have paid the balance due on the same.

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Hargraves, the administrator of James H. Shorter, and now defendant to the bill, put in his answer to said amendment; exceptions were filed thereto, some of which were sustained, and he ordered to answer over.

The substance of his answer was, that he had no information or belief as to James H. Shorter's knowledge of John Dillingham's failing circumstances or insolvency; that he believes the assets of the estate of Eli S. Shorter, which came into the hands of James H. Shorter, amounted to between two and three hundred thousand dollars, and admits that open accounts to the amount of one hundred thousand dollars were paid by him, and that too with a knowledge of the existence of said administration bond, and that the house and lot and negroes came into his hands, and that other funds and assets more than sufficient to pay the balance of said judgment, &c.

Upon the case being called for trial, defendant moved to dismiss the complainant's bill for want of equity.

The Court overruled the motion and defendant excepted.

Defendant then moved to dissolve the injunction, on the ground that there was no equity in the bill, and if any, the same was fully sworn off by the answer, which motion the Court overruled, and defendant excepted.

WELLBORN, JOHNSON and SLOAN, for Plaintiff in error.

JONES & JONES, and BLANDFORD, *contra*.

By the Court.—McDONALD J. delivering the opinion.

The bill was filed and answered in 1844. It was amended in June, 1857. The original defendant died, and the present defendant, as his administrator, was made a party in his stead. He answered the amended bill on the 8th June 1857. His answer was excepted to, some of the exceptions were sustained, and those which were sustained were answered by the defendant.

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[1] The motion to dismiss the bill was made when the cause was called for a hearing on the merits, thirteen years after it was filed, and after it had been fully answered. The ground relied on in support of the motion was, that the complainant had an adequate remedy at common law. The bill ought to have been demurred to at an early stage of the cause. *2 Maddocks, Ch. 170, 287.* It is too late after the parties have submitted so long to the jurisdiction of a Court of Chancery, and the parties have incurred so much expense in the litigation to move to dismiss the bill for such cause. *Underhill vs. Van Courtland, 2 Johnson's Ch. Rep. 339, 369.*

The answer and the original bill admit sufficient matter to warrant the retention of the injunction, if there was sufficient ground for granting it in the first instance. That assets sufficient were placed in the hands of the defendant in error belonging to Dillingham's estate to indemnify him for what he had paid, and the balance due on the execution, as alleged in the defendant's answer, may depend on proofs at the hearing under a proper modification of the pleadings, if they do not now warrant its admission. The part of the answer which brings this matter before the Court, is not strictly responsive to the bill; and if, on going into an account between the parties, it should be found that defendant in error has in his hands assets properly applicable to his indemnity for what he has paid, and the amount for which he is yet liable, the injunction may then be dissolved, and the defendant in error be required to account for the said assets, either by a decree to pay the amount yet due, and to acknowledge satisfaction of what has been paid, if proper parties to warrant such a decree be before the Court; or to decree a dismissal of the bill against the plaintiff in error, and to allow the execution to proceed.

Judgment affirmed.

Judge BENNING being related to one of the parties did not preside in this case.

Morris et ux. vs. Stokes, ad al'r, &c.

THOMAS MORRIS AND WIFE, caveators; plaintiffs in error, vs.
WILLIAM B. STOKES, administrator, &c. prepounder, defendant in error.

Where a case has been full and fairly submitted to the jury, both upon the law and the facts, and the Circuit Judge is not dissatisfied with the verdict, it requires an extraordinary case to authorize this Court to interfere and award a new trial.

Caveat to will, from Muscogee county. Tried before Judge **WORRILL**, at June Term, 1858.

The facts of this case will be found fully stated in the **21st vol. Ga. Reps.** 552.

The judgment of the Court below, upon a former trial, having been reversed by the Supreme Court, the case was remanded and came up again for trial, and after the testimony was closed and argument had, the Court amongst other things, charged the jury as follows:

"If you shall believe that John L. Lewis was the guardian of the testator at the time the will was executed, that it was executed in the guardian's house, that the testator at the time, was living with his guardian, that the guardian had any thing to do in having the will written, and he takes a considerable benefit under it, then the presumption of law is against the validity of the will, and that undue influence was used by the guardian in procuring it to be executed, and you will find against the will, unless the proof is clear and satisfactory, that Phillips, the ward, in making the will, acted of his own volition, and that the guardian exercised no influence over him. But if Lewis was the guardian of testator, and the will was executed in his house, and testator lived with him, and the guardian had any thing to do in the writing of the will, yet you will find in favor of the will, provided the proof shows that the testator acted of his own volition in the execution of the same, and that the guardian exercised no influence over him."

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The jury found for the will. Whereupon, caveators moved for a new trial on the grounds:

- 1st. Because the verdict was contrary to law.
- 2d. Because the verdict was contrary to the evidence
- 3d. Because the verdict was contrary to the charge of the Court.

The Court after argument, refused the motion for new trial, and counsel for caveators excepted and assign said refusal as error.

B. A. THORNTON; and Wm. DOUGHERTY, for plaintiffs in error.

JONES & JONES; and R. W. DENTON, *contra*.

By the Court.—LUMPKIN, J. delivering the opinion.

This is the second time this case has been before this Court. The complaint before was two-fold. 1st. That the Court mistook the law of the case on the first trial, 2d. That certain testimony was excluded which should have been admitted.

The plaintiff in error, then and now, having been sustained on both points, the cause was submitted to another jury. On the late trial, all the caveators' evidence was admitted, and the law charged strongly against the propounder of the will. The jury found for the will. A new trial having been applied for and refused, a reversal is sought here, upon the grounds, that the finding is contrary to evidence and the charge of the Court.

We omit any notice of the latter ground. It is a good ground, if the Court charged the law correctly, and the verdict is contrary to the charge. If the Court charge the law wrong, it is no ground for a new trial, that the verdict is contrary to the charge. It is sufficient therefore always to insist, that the verdict is contrary to law. For it must come to this test at last.

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Was the verdict so strongly and decidedly against the evidence as to constrain the Judge who heard the case, to grant a new trial? And to require us, to reverse his judgment for refusing to do so?

We might have found differently, had we been of the jury. If the presiding Judge had granted a new trial, instead of denying it, we would have acquiesced in his judgment. And yet we do not feel at liberty to overrule the contrary conclusion to which his honor has come, as a flagrant abuse of his discretion. If the Judge who heard the case is not dissatisfied with the verdict, it should be a strong, yes, an extraordinary case, to justify us in ordering a new trial over his head.

It is conceded, that the testimony was fully and fairly put before the jury. The caveators find no fault with the charge. There is proof enough in the record to sustain this verdict. Would it not be assuming too much, to remand this cause, with a view to coerce the jury to reject the will?

The law of the case is fully vindicated in the late opinion of this Court; and is not impugned by the authority cited from *Hill on Trustees* 158, and 17 *Engl. Law & Eq. Rep.* 357. It was forcibly submitted to the jury by the Circuit Judge. It cannot be inferred from their finding, that the jury have misapprehended or disregarded it. Young Phillips, the testator, was at the house of the witness, Wynn, several months before he made his will. He was certainly free from all fear of his guardian on that occasion. He came to get Wynn to act as executor of his will, and trustee of his sister. He then stated that he intended to give his sister Leonora, the legacies which he did leave her by his will, *and no more of his estate.*

His bounty to his guardian, though liberal, is not quite so large as it is represented. He states that he had received property and money from him, for which he had no showing. He therefore directed him to be credited with \$10,000. This looks large. But it will be remembered that his guardian

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had turned over to him at one time, seventeen or eighteen negroes, which he estimated at \$10,000, and which are intended to be covered by this credit.

He directs a further credit to be allowed him, for all vouchers, supported by the *guardian's affidavit*; and for all receipts not already returned to the Ordinary. There is nothing necessarily wrong in this. It compels the guardian to account with the remaindermen, at the death of the grandparents of his ward, for all the money in his hands.

Finally, he gives him commissions on all his receipts and disbursements. This is what we as lawyers often do, in settling estates, whether returns have been regularly made or not. He makes him residuary legatee, until the death of his grand-parents, when the property goes over to others.

I do not refer to these facts to show, that the verdict was right. But to repel the inference, that the jury acted under the influence of some undue bias. I repeat, that as a whole, the evidence has struck me differently from what it did the jury; but that is their business, not mine. The case was fairly left to them upon the facts and the law.

The case turned after all, very much upon the credibility of one of the caveator's witnesses, Dr. Lyons. The character of this witness and the credit due to him were matters peculiarly within the province of the jury. Include the testimony of this witness, and the case is with the caveators. Exclude it, and the weight is perhaps the other way. We held that it was competent, and it was let in. But we cannot rule that the jury were bound to believe it, whether discredited in any of the usual ways or not. Counsel for caveators, say they lost the case because Dr. Lyon was not believed. We cannot help that. We in this Court labor under a great disadvantage in weighing the testimony. Men will be estimated according to their moral worth. And they ought to be. And of this, the Court below and the jury are much better judges than we can be.

Seeing that we are called on to pass upon the evidence in,

Stanford vs. Pruet.

almost every case brought before this Court, it begins to be time that a tariff should be established, by which it can be ascertained how many *jurors* shall go to make a *Judge*, upon mere questions of fact. Or, in other words, how many verdicts shall weigh against the opinion of the Court? In the case of *Mealing & Pace*, to which this has been attempted to be assimilated, (21 *Ga. Reps.* 464,) neither the counsel nor the jury seem to have understood correctly, the legal principles involved in that trial, until the case went back the last time. And I should feel much more inclined to overrule the verdict in this case, were there nice questions of legal science concerned. But here it is merely a deduction from the facts. The right and wrong of this case, and all cases like it, where the law of the case is but the justice of it, the common mind may be more competent to decide than mine.

Under these circumstances, whether my judgment is with the verdict or not, I do not feel at liberty to interfere.

Judgment affirmed.

Judge BENNING having been formerly of counsel in this case, did not preside.

THOMAS W. STANFORD, endorsee, plaintiff in error, vs. JAMES M. PRUET, endorser, defendant in error.

[1.] If the point be made and insisted upon, the statute of another State, can only be proven in our Courts, by a certified copy.

[2.] A. and B. are indebted to C. at Columbus, Georgia, who agree to take their note with D. as security, who resides in Alabama. A note is drawn dated at Columbus, carried by the *makers*, to D., who endorses it, and returns it to one of the makers, who delivers it to C. at Columbus.

Held, That the endorsement is a Georgia and not an Alabama contract.

Stanford vs. Pruet.

Assumpsit, in Muscogee Superior Court. Tried before Judge WORRILL, at November Term, 1858.

Thomas W. Stanford sued out bail process in an action of assumpsit, against James M. Pruet, as endorser upon a promissory note, of which the following is a copy, to-wit:

COLUMBUS, April 16th, 1856.

"\$300. Three months after date, we promise to pay to James M. Pruet, or order, three hundred dollars for value received.

(Signed,) STRIPLING & ALLEY."

Endorsed, "Pay T. W. Stanford or order."

(Signed,) JAMES M. PRUET."

It appeared that Stripling and Alley being indebted to Stanford of Columbus, Georgia, three hundred dollars, a balance due for a boiler bought by them of him in *Columbus*, Georgia, made the note sued on, and procured Pruet to endorse it for their accommodation. After Pruet endorsed it, it was delivered to plaintiff. The makers and endorser, at the time the note was made and endorsed, resided in and were citizens of the State of Alabama, where they all resided at the time this suit was brought.

Defendant pleaded that he endorsed said note in the State of Alabama, where he and the makers resided, and that by the laws of that State, he as endorser was discharged unless the makers were sued to the first Court after the note became due, and a return of *nulla bona* on the execution; and that said note was not sued on within that period.

Defendant in support of his plea proposed to read in evidence, from a book, purporting to be a code of the laws of the State of Alabama, and published by authority of law, so much thereof as showed that by the law of said State an endorser of a note not payable at a bank, is not liable on his endorsement unless the maker of the note is sued to the first Court after the same falls due, and a return

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of no property is had on the execution. To the reading of which, plaintiff objected, on the ground that the book was not evidence of what the law of Alabama was; but that it must be proved by a witness, if it was the unwritten law, or by an exemplified copy, if it was statute law. The Court overruled the objection, and admitted the book to be read as evidence of what was the law of the State of Alabama, and to this ruling plaintiff excepted.

It was admitted that the makers and endorser of the note lived in Barbour county, Alabama, at the date thereof, and have resided there ever since. That there had been two Courts each year in which suit might have been brought there.

The Court charged the jury, that if there was no evidence, that at the time defendant endorsed the note, it was the understanding of the parties, that the undertaking of defendant was to be performed in the State of Georgia, then the endorsement will be deemed an Alabama and not a Georgia contract, and they should find for the defendant.

But if from the proof, it appeared that the undertaking of the defendant was to be performed in Georgia, though the note was made and endorsed in Alabama, then the endorsement will be held a Georgia contract, and they should find for the plaintiff.

To which charge plaintiff excepted. Plaintiff then requested the Court to charge the jury:

1st. That if they believe from the evidence that the defendant endorsed the note in Alabama for the accommodation of the makers, and handed the same back to Alley, one of the firm, who brought the note and delivered the same to the plaintiff in Columbus, Georgia, to pay a debt the makers were owing plaintiff, then the endorsement is a Georgia contract, and the plaintiff is entitled to recover.

2d. That if the jury believe that defendant endorsed the note and handed it to the makers, and that Alley, one of

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said makers, delivered the same to plaintiff in Columbus, Georgia, that then the plaintiff is entitled to recover.

3d. That if the jury believe that plaintiff agreed to accept the note of Stripling & Alley, endorsed by a person residing in the State of Alabama, and they made the note sued on, and defendant endorsed it in the State of Alabama, and delivered the same to one of the makers, who took it, thus endorsed, and delivered it to the plaintiff in Columbus, Georgia, and the same was there accepted in payment of the debt of Stripling & Alley, that then the plaintiff is entitled to recover.

4th. That if the note on its face purports to have been made in Columbus, and if so purported when endorsed by defendant, and for the benefit of the makers, and thus endorsed, was delivered to Alley, to be negotiated in Columbus, Georgia, that then they may infer that it was intended by the defendant, that it should be performed and executed under the laws of Georgia.

Each and all of which requests, the Court refused to give in charge, and plaintiff excepted and tendered his bill of exceptions, assigning as error, the foregoing rulings, charges and refusals to charge.

• WELLBORN, JOHNSON & SLOAN, for plaintiff in error.

DOUGHERTY; and LAWS, *contra*.

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] Can the laws of another State be proved in this, by a book purporting to contain those laws, and to be published by authority of the other State?

It is conceded, that they cannot be at common law; but that an exemplified copy of the statute must be produced. In the State Courts, there is a conflict of practice upon this subject; an overwhelming majority adhering to the common law rule. It would be a great convenience to admit the book

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as evidence. We admit their reports, without questioning their authenticity. And we often form our judgment upon the citation of State ~~Statutes~~ in these reports. Still, I am not prepared to say, that we are authorized to depart from the common law rule, without legislation, when the point is made and insisted upon. I trust the Legislature will interpose and regulate this matter. It puts parties to unnecessary delay, expense and trouble, and for no compensating benefit. It is much easier in this age of sleight of hand, to forge the exemplification of a statute, than to palm off a spurious book upon the Courts. And especially should this courtesy be extended to our next door neighbor, Alabama, where Cobb's Digest is constantly read as evidence of our law, without objection.

[2.] Is the endorsement of Pruet an Alabama or a Georgia contract? The note was for a debt due to the plaintiff, by Stripling & Alley. He resided at Columbus, Georgia, where the note is dated, and required city security. Stripling & Alley refused to give it, but promised to give the defendant, Pruet. Alley took the note to Midway, Barbour county, Alabama, where Pruet endorsed it, returned it to Alley, one of the makers, who delivered it to the plaintiff at Columbus.

Had Alley been the agent of Stanford, to get the endorsement, a delivery to him in Alabama, would have been a delivery to Stanford. And that would have been the case of *Levy & Cohen*, (4 Ga. Rep's. 1,) where we held that the deposit of the note in the post office at *Savannah*, was a delivery to the plaintiff *there*, the mail being the common agent of the contracting parties for that purpose. In *Cox vs. Adams*, 2 Kelly, 158, the contract of endorsement was complete in Alabama. And of course governed by the laws of that State.

But here, Alley was not representing Stanford, but acted for himself and Stripling. He was not bound to deliver this note at all. He would have violated no obligation, been guilty of no breach of trust, had he failed or refused to do

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so. His creditor agreed to this arrangement provided the debtor would make it. Still he might, even after the note was endorsed and returned to him, have repudiated or changed his mind; and adjusted his liability in some other way. It was his paper, and optional with him to deliver or withhold it. The contract was not binding, and consequently not consummated until the delivery of the note to Stanford at Columbus. This being so, was not the note, made and endorsed at Columbus, and therefore to be considered a Georgia contract, as much so as if Pruet had actually and manually endorsed it there, or wrote his name in blank, to be filled up at Columbus, by Alley, *his agent?* We think so.

Judgment reversed on first ground.

Judge McDONALD, on account of illness, did not preside in this case.

ROBERT E. DIXON, administrator, plaintiff in error, vs. RICHARD R. CUYLER, administrator, defendant in error.

In a proceeding to foreclose a mortgage on real estate, it is competent for the mortgagor, at the second Term, to show for cause, why the rule absolute should not be granted, that the mortgage debt is usurious, that it is founded upon a gaming consideration, or that it was contracted to compound a felony, or that the mortgage was given under duress, or has been released, or to avail himself of any other defence which goes to show that the mortgagee is not "*entitled*" to a judgment of foreclosure, or that the amount claimed is not due.

The administrator of the mortgagee is entitled to foreclose *at law* against the administrator of the mortgagor, and the heirs of the mortgagor are not necessary parties.

Foreclosure of mortgage, from Muscogee county. Decision by Judge WORRILL, at November Term, 1858.

Richard R. Cuyler, administrator of James Holford, de-

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ceased, filed his petition for the foreclosure of a mortgage of certain real estate, executed by Daniel McDougald to said Holford. Robert E. Dixon, the administrator of McDougald, was made the party defendant in and to the petition which was returnable to November Term, 1858, of Muscogee Superior Court, at which Term Dixon appeared and demurred to the petition, on the grounds:

1st. That the petition for a *rule nisi* showed that Holford was to use due diligence to collect the bills, the payment of which McDougald had guaranteed, and that said petition showed upon its face that Holford had not used due diligence.

2d. That Holford's *administrator* could not proceed by petition, under the Act of 1799, to foreclose said mortgage against Dixon, *administrator* of McDougald, but to do so, should file his bill in chancery, and make the heirs at law of McDougald parties.

After argument, the Court overruled the demurrer, upon the ground that the same was premature, that not being the proper time to make and hear said demurrer. To which decision counsel for defendant excepted.

The Court then granted the usual *rule nisi*, and defendant excepted.

JOHNSON & SLOAN; RAMSAY & CARITHERS, for plaintiff in error.

DOUGHERTY; and COOPER, *contra*.

By the Court.—LUMPKIN, J. delivering the opinion.

This was an application to foreclose a mortgage on real estate, purporting to have been made by Daniel McDougald, in his lifetime, at the instance of R. R. Cuyler, administrator of James Holford, deceased. Robert Dixon, the administrator of McDougald, came in to Court and demurred to the application on two grounds.

1st. Because the mortgage was given by McDougald to

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secure a certain guaranty given to Holford to insure the collection of a deposit made by him in the Planters and Mechanics Bank, said guaranty imposing *due diligence* on Holford to collect the deposit, and the record showing that no such diligence had been used.

2d. Because the administrator of the mortgagee could not foreclose against the administrator of the mortgagor at law; but he must go into equity, and make the heirs a party. The Court overruled the demurrer, upon the ground that it was premature, and granted the *rule nisi*.

When may the mortgagor be heard against the proceeding of foreclosure? As the statute requires that service be made of the *rule nisi*, *after it is taken*, either personally or by publication, the appearance in this case was *perhaps* premature. I am not so well satisfied on this point. Notice of the intention to apply should, by law, be given so many days before Court, or the mortgagor served with a copy of the petition, as in other suits. It were better every way if he could be heard at the first Term. Our statute prescribing the mode of foreclosing mortgages, which is exceedingly defective, does not seem to contemplate this. Construe it literally, and it is too absurd and unreasonable to be executed. It would be an unmitigated curse. It says nothing about appearance until after the rule absolute is granted, the property sold, and the money brought into Court; and indicates no other defence than but payments and equitable sets-off. This exposition, however, of the Act, has been long since exploded.

It has been usual for the Courts to require of the party to make out a *prima facie* case; to exhibit with his petition the evidence of indebtedness. But be this as it may, what must be shown before the mortgagee is entitled to his rule absolute? He must show that he is "*entitled*" to foreclose. That is the language of the Act. And also, *what is due* upon the mortgage. It follows, of course, that both of these matters may be contested by the mortgagor. He may insist

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that the mortgagee is not "*entitled*" to foreclose for the whole or any part of his claim; that, in truth, there is nothing "*due*" on it.

And this he may do, by what appears on the face of the papers, or by pleading and proving that the note is usurious, (1 *Kelly*, 392,) or founded upon a gaming consideration, or that it was given to compound a felony, or was coerced by duress, or that the mortgage has been released. In showing cause against the rule, he may avail himself of these and all other meritorious defences.

Why give notice at all, if the mortgagor is shut out from any defence until after judgment of foreclosure is rendered against him? There is enough in the Act to justify this interpretation. It is one taken by this Court the first year after its organization; and the only one which will save the statute from being looked upon as a nuisance.

2. As to the other ground, we think the Court construed the Act of 1799 correctly. The Legislature having given a common law remedy to partition lands, foreclose mortgages on real estate, and establish lost papers, we apprehend equity has lost its jurisdiction over these subjects, provided the remedy at law is complete. Suppose a bill filed for any of the foregoing purposes, would it not be demurrable, upon the ground that the complainant had an adequate and ample remedy at law? We think so.

If there be special circumstances, recourse may still be had to chancery. We see no reason why the administrator of the mortgagee should not apply at law to foreclose. Nor do we think it necessary that the heirs of the deceased mortgagor should be made a party. The administrator represents the estate for the purpose of paying just debts, and resisting the payment of all improper demands. He is bound by the statute to pay mortgages, and to pay this mortgage, provided it be foreclosed. Is he not the proper person to contest its enforcement? Heirs at law may maintain ejectment against a wrong doer. And they may make partition amongst them-

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selves of the lands of their ancestor. But if these lands have to be applied to the payment of debts, the administrator is the only legal representative of the intestate for that purpose. And the heirs are bound by his acts.

Judge BENNING having been formerly of counsel in this case, did not preside.

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THE SOUTHERN BANK OF GEORGIA, plaintiff in error, vs. THE MECHANICS SAVINGS BANK, defendant in error.

- [1.] Where a bank is sued, an appearance by the bank to take advantage of an important privilege secured by the charter, is a waiver of any irregularity in the service of the writ.
- [2.] Where a bill of exchange or draft is endorsed *in full* by the payees, suit cannot be maintained in the name of the payees, while the endorsement stands.
- [3.] Where two sets of notarial protests upon the same bill, are filed under the act of 1836, both are entitled to be read without further proof by the Notary.
- [4.] Under the 17th section of the charter of the Southern Bank of Georgia, no action can be brought against said bank under said charter, until special demand is made of the debt or due claimed by the creditor.

Assumpsit, in Decatur Superior Court. Tried before Judge ALLEN, October Term, 1858.

This was an action of assumpsit brought by the Mechanics Savings Bank against the Southern Bank of Georgia, on three bills of exchange, of which the following are copies:

“SOUTHERN BANK OF GEORGIA,
Bainbridge, August 30th, 1857.

\$3000. Sixty days after date pay to the order of S. B. Williams, Cashier, at Nassau Bank, New York City, three thousand dollars.

H. H. HUBBARD, Cash'r.”

To Cashier of Dandridge Bank, Dandridge, Tenn., No. 309.”

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Endorsed. "Pay to Geo. W. Duer, Cashier, or order.

S. B. WILLIAMS, Cash'r."

Words written across the face, "accepceted,

WM. A. BRYAN, Cash'r."

"SOUTHERN BANK OF GEORGIA.

Bainbridge, July 22d, 1857.

\$3000. Ninety days after date pay to the order of S. B Williams, Cashier, (acceptance waived) three thousand dollars.

N. L. CLOUD, Pres.

To Bank of the Republic, New York City, No. 326."

Endorsed. "Pay to Jno. R. Kearney, Assistant Cashier, or order.

S. B. WILLIAMS, Cash'r."

"SOUTHERN BANK OF GEORGIA,

Bainbridge, July 1st, 1857.

\$3000. Ninety days after date pay to the order of S. B Williams, Cashier, (acceptance waived) three thousand dollars.

N. L. CLOUD, Pres.

To Bank of Republic, New York City, No. 308."

Endorsed. "Pay Jno. R. Kearney, Assistant Cashier, or order.

S. B. WILLIAMS, Cash'r."

Service was acknowledged in the usual form, and process waived on the original declaration by R. W. Hubbard. At the appearance Term, an affidavit, of which the following is a copy, was sworn to in open Court.

"GEORGIA, Decatur Superior Court,

Mechanics Savings Bank,

vs.

The Southern Bank of Georgia.

} April Term, 1858.

Appeared in open Court, Rufus W. Hubbard, Cashier of the Southern Bank of Georgia, who being duly sworn, says that the Southern Bank of Georgia has a substantial defence to the suit against it by the Mechanics Savings Bank; and

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that the Southern Bank of Georgia, is less prepared for trial, than it will be at the next Term of this Court.

(Signed.)

R. W. HUBBARD, Cash'r.

Sworn to in open Court, this 28th April, 1858.

LUKE MANN, Cl'k, S. C.

Upon the foregoing affidavit, the Court continued the cause until the next Term, when defendant filed his plea, denying that R. W. Hubbard was Cashier of the Bank, or that he had authority to acknowledge service or waive process as aforesaid. The Court, on motion, ordered this plea to be stricken, because it was not verified by affidavit.

Plaintiff having tendered in evidence, the bills of exchange, and certain papers purporting to be notarial protests, defendants counsel objected to the protests, on the ground, that they did not show the non-payment of the bills, nor that the defendant had notice of the dishonor of the same. Counsel for plaintiffs, then tendered in evidence, as notarial protests of said bills, other papers not attached to them, but which did show the non-payment of the bills, and that notice of the dishonor had been properly given. Counsel for defendant objected to the introduction of the last mentioned papers, "because they contained notarial acts, subsequent to the original protests." The Court overruled the objection, and the jury returned a verdict in favor of the plaintiff for the sum of nine thousand dollars, with interest and costs of suit, and five per cent. damages.

Defendants counsel moved for a new trial, on the following grounds :

1st. Because R. W. Hubbard, who acknowledged service, and waived process, had no authority so to do; and the Court erred in not dismissing the case, on motion, for want of service.

2d. Because the Court refused to hear the issue tendered by said bank, denying the authority of said R. W. Hubbard to acknowledge service, and waive process.

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3d. Because plaintiff showed no title in himself, to said bills of exchange.

4th. Because the plaintiff had neither alleged in his declaration, nor proven on the trial, that any demand had been made on the bank, for the payment of said bills, before suit was brought on the same.

5th. Because the Court erred in allowing the second set of protests to go to the jury, as evidence of notice of the dishonor of the bills.

6th. Because the Court erred in allowing the bills of exchange, and notarial protests to go to the jury, as evidence of indebtedness of defendant to the plaintiff.

7th. Because the Court erred in its charge to the jury, that the plaintiff was entitled to five per cent. damages, if the bills were returned protested for non-payment, there being no allegation of damages in plaintiff's declaration.

8th. Because the verdict is contrary to law, in this, that it finds for the plaintiff, the principal debt, with five per cent. damages, when the verdict for damages should have been added to the principal, and the whole found in bulk as principal.

The Court refused to grant the new trial, and defendant, by counsel, excepted.

LAW & SIMS, for plaintiff in error.

COLE, *contra*.

By the Court.—LUMPKIN, J. delivering the opinion.

Ought the Court to have sustained the motion to dismiss this case?

[1.] The first ground taken in the motion, was, that R. W. Hubbard, who acknowledged service and waived process upon the writ, was not at the time, nor since, an officer of the Southern Bank of Georgia, and had no authority to make said acknowledgment and waiver, or to bind the said bank,

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nor did he undertake, by signing his name as President, Cashier, or other officer of said bank, to waive service or process.

A sufficient reply to this objection is, that the President of the bank came into Court at the appearance Term, and made oath, under the 17th section of the charter, that the bank had a substantial defence to the suit, and that said bank was less prepared for trial, than it would be at the next Term; and thus the trial was postponed for six months. The plaintiff being entitled, under the charter, to take judgment at the first Term, unless this affidavit was made. It is immaterial, therefore, whether Hubbard had authority to do what he did or not, this appearance ratified his act.

[2.] The second ground taken to dismiss the case, was, that the plaintiff had not shown any title in himself, to the bills of exchange sued on, or any authority to sue said bills in the name of the plaintiffs. Neither was there any averment in the plaintiffs declaration of the transfer of said bills by the payee to the plaintiff.

The papers sued on, in this case, could not be transferred by delivery, but by endorsement only; and they are endorsed in full; and these endorsements prove title out of the plaintiff. It is said, that it was a mere inadvertence that the endorsements were not stricken out, having been put there, merely for the convenience of collecting these bills. This may be so; and probably is. And yet it is rather unaccountable, that when the objection was made in the Court below, to the plaintiff's right to maintain this action, thus calling the attention, of course, specially to this point, the endorsement was suffered to remain.

The Court, we think, erred in overruling this ground.

[3] The defendants counsel tendered an issue, and offered to prove that R. W. Hubbard had no authority to bind the bank by his acknowledgment of service and waiver of notice. This application was disallowed by the Court, because it was not sworn to. Perhaps the Court was techni-

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cally right, in as much as it was a dilatory proceeding. But the Court was right for another reason. Conceding the want of authority in Hubbard, still, the defendant coming in and pleading to the action, was estopped from denying the sufficiency of the service.

Another question raised in the record is, as to the admissibility of the notarial protests. There were duplicate papers. Those accompanying the bills, and which counsel in argument calls the originals, did not state that notice was given of the dishonor of the bills. This objection having been made, another set were offered in proof, containing this statement. All of these papers had been filed in accordance with the Act of 1836; *Cobb*, 273. Defendant's counsel contended in the Court below, and insists here, that the latter set should have been proven by the Notary, so that he might have an opportunity of cross-examining him.

I would simply suggest, that he would have made nothing by it. When was any evidence ever elicited from a Notary Public or merchant's *swearing* clerk, hurtful to their employers?

The Act of 1836, is very comprehensive, and we think, justified the Judge in admitting the testimony. Neither set are dated. It is only conjectural, therefore, that the set attached to the bills are the originals, as they have been termed. The explanation of this matter, is no doubt this. It is only under our law, that these protests, by being filed, are made evidence. It is not so in New York. The first set were made out in conformity with the custom in New York. But the omission, as to notice, being discovered, the second set were amended in that particular. Both were made out, from a memorandum book, kept by the Notary for that purpose.

[4.] The plaintiffs having closed, the defendant moved that the case be non-suited, on the ground, amongst others, that it was not averred or proven, that a demand had been made on the bank before suit had been brought. We hold that

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this was necessary. By the 17th section of the charter of the Southern Bank of Georgia, it is provided, that "If said bank shall at any time fail, or refuse to redeem any of its notes *on demand*, or pay any other of its debts, when due, *and payment demanded*, it shall be lawful for the holders of such bills, or creditors of said bank as aforesaid, immediately to bring suit against said bank for the recovery of the same; and there shall be judgment against said bank, at the first Term of the Court to which said suits are returnable, unless the President and Cashier of said bank, will swear that the bank has a substantial defence to said suit, and that said bank is less prepared for trial than it will be at the next Term of said Court; and when judgment shall be rendered against said bank, execution shall issue against the property of the stockholders, which execution shall first be levied on the property of the bank; but if no property of the bank can be found, the sheriff shall make an entry on the execution to that effect; and it shall be his duty forthwith to levy said execution upon the individual property of any of the stockholders, and so proceed until said execution is satisfied." *Pamphlet Acts, 1855, 1856*, p. 95.

In as much as the bill holder or creditor was entitled by the charter to get his judgment at the first Term to which his action was brought, it was reasonable and right that he should be required to demand the payment of his debt before suit. The act is clear and imperative upon this point.

To obviate this objection, it is suggested by counsel, that this is an action at common law, and not brought under the charter. We will not stop to consider whether the bank can be sued in any other way. Perhaps it may be; and the remedy therein given is cumulative only. The question is, how was this suit brought? If not under the charter, why was the defendant forced to come into Court at the appearance Term, and make the showing required by the charter, to enable him to prevent a judgment at the first Term? That was the appropriate time for the disclaimer to be made, that the pro-

McBain et al. vs. Wimbish.

ceeding was not under the charter. Is not that very affidavit, there filed, relied on by the plaintiff, and properly, as a ratification of the acknowledgment of service and waiver of notice by Hubbard? But if this writ was at common law, this showing was a nullity, and the plaintiff could derive no benefit from it.

Counsel refer to the form of the judgment rendered in this case, to show that this was not understood to be a proceeding under the charter. What is it? A general judgment against the bank only, and not against the stockholders. An examination of the 17th section, which I have quoted at length, will show, that the judgment is in strict conformity with the statute, and could not have been entered up otherwise than as it is. How the stockholders are to be charged in execution upon this judgment, it is not for us to say. It may be by *scire facias*; but sufficient unto the day is the evil thereof. We have had trouble enough in times past, to expound these bank charters, and should our lives be spared, we need not expect exemption in time to come.

This suit, then, having been brought under the charter, and no special demand having been alleged or proved, a non-suit should have been awarded in the case.

Judgment reversed.

McDONALD, J. absent.

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**NEWMAN MCBAIN, and others, caveators, plaintiffs in error, vs.
ELIZABETH WIMBISH, propounder defendant in error.**

**Letters testamentary should be granted in the county of the testator's residence,
at the time of his death.**

McBain et al. vs. Wimbish.

Caveat to will, from Schley county. Tried before Judge WORRILL, at August Term, 1858.

Elizabeth Wimbish, the widow and executrix of William Wimbish, deceased, propounded his will for probate in solemn form before the Ordinary of Sumter county. The case was, by consent, transferred to the appeal in the Superior Court of said county. Pending the appeal, Schley county was created, and the case transferred to that county.

Upon the case coming up for trial in the Superior Court of Schley county, counsel for caveators moved to dismiss the case, and that it be returned to the Superior Court of Sumter county, on the grounds, that caveators were residents of Sumter county, and that the testator died in that county; his residence being in that part of the county, which was afterwards cut off and formed a part of the new county of Schley, and the application for probate was made to the Ordinary of Sumter county, and the appeal taken to the Superior Court of that county, before the creation of Schley county.

The Court below overruled the motion, and counsel for caveators excepted.

The cause proceeded and the jury found for the will.

Whereupon, counsel for caveators tendered their bill of exceptions, assigning as error the decision above excepted to.

McCAY & HAWKINS, for plaintiffs in error.

SCARBOROUGH; BLANFORD & CRAWFORD, *contra*.

By the Court.—LUMPKIN J. delivering the opinion.

The only question argued in this case, and upon which the judgment of this Court is invoked is, in what county the will of a testator should be proven, and letters testamentary should issue?

The testator resided at the time of his death in that part of Sumter county, which has been cut off into Schley. The

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will was propounded for probate in Sumter; a caveat was entered and an appeal taken by consent from the Ordinary to the Superior Court. At this stage of the case, a division of the county took place, and the record of this case with that of others, was transferred from Sumter to Schley.

There is nothing in the Act of 1857, creating this new county, which controls this matter. What is more, there is no express law upon the subject. If there be, it has escaped my search. The practice has been to make probate of wills and grant letters testamentary in the county where the testator resided at the time of his death. Letters of administration must be granted in the county where the intestate resided at the time of his death, and no where else. *Cobb*, 286. Doubts had arisen as to where letters of administration should be granted, and some confusion resulted, as the intestate might have *bona notabilia* in different counties. None existed as to testators, the practice having been uniform, as I have stated. Hence, they were not included in this Act. They come within its spirit.

By the act of 1838, *Cobb*, 285, where a testator dies out of the county of his residence, his will may be proven in the county where he dies, provided, any of the witnesses live there. But the will and probate are to be transmitted, says the statute, to the county where letters testamentary issue, without specifying what county. The implication is irresistible, however, in favor of the county of his residence at the time of the testator's death. If the probate is to be sent to some other county, to what other except to that of the decedent's residence? The exceptional cases provided for in this Act, establishes the general rule. And even this only extends to the probate of the will, and no further.

Other reasons might be assigned to sustain the decision of the Circuit Court. We see no law for reversing it.

Judgment affirmed.

Waddel vs. The State.

JACOB WADDEL, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

In cases of vagrancy where the evidence is sufficient to authorize the grand jury to present the accused, and the traverse jury to convict him of the offence, and the presiding Judge refuses a new trial, this Court will not interfere.

Vagrancy, from Marion county. Tried before Judge WORRILL, at September Term, 1858.

Jacob Waddel of the county of Marion, was indicted for vagrancy and convicted. He moved for a new trial, on the ground that the verdict was contrary to the evidence. The Court refused the motion, and counsel for defendant excepted.

BLANDFORD & CRAWFORD, for plaintiff in error.

Sol. Gen. OLIVER, represented by W. D. ELAM, *contra*.

By the Court.—LUMPKIN, J. delivering the opinion.

The defendant having been convicted of vagrancy in the county of Marion, applied in the Court below for a new trial, on the ground that the verdict was contrary to the evidence. And the motion being refused, he brings up his case by writ of error, to this Court.

I was never more impressed with the folly of sticking to forms, than when reading the presentment of the grand jury in this case. Jacob is accused of having with force and arms, &c., doing what? Knocking some one down? No, but with force and arms, doing nothing; strolling about in idleness. He is not indicted for being a *know-nothing*, but a *do-nothing*. The offence itself is somewhat anomalous. Every other in the code charges the defendant with doing something. This, for doing nothing.

Is the offence sufficiently sustained by the proof? The grand jury presented Jacob, and the traverse jury convicted him

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upon the testimony, notwithstanding, Jacob was seen ploughing a potato patch, and doing some other small jobs, within the last two years. His fancy seems to have been mostly to walk the high-ways. The case is not a very strong one, still there was proof enough to warrant a conviction. And the jury are peculiarly the judges of the proof.

So Jacob will have to go to work; and not only to work, but to *hard work*. So says the code. We fear this will go *hard* with Jacob at first. It will be a great change in his habits. Might not the law, in this humanitarian age, have condemned the vagrant the first year, to work only; and the second year to *hard work*? Ought not a portion of the vagrant's *hard* earning, to be appropriated to his family, provided he have one?

I am quite satisfied that a large portion of the population of our towns, could be convicted upon stronger proof than this. It is time, perhaps, to give them a scare; to admonish them of the old adage, that a bird that can sing, and wont sing, must *be made* to sing. That able-bodied man must not cumber the ground, living on the sweat of other men's toil. "Why stand ye here all the day idle?" is a question which the master of the vineyard propounds, and which the penal code will have answered.

Judgment affirmed.

HENRY J. LAMAR, plaintiff in error, vs. THOMAS P. COTTL²⁷ | 22 283
and ABNER BURNAM, defendants in error. | 497

Where an action is brought against the maker and endorser of a promissory note residing in different counties, and the writ has been regularly filed, sued out and served on the non-resident defendant, leave may be granted to perfect service on the resident defendant. And after both defendants have

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appeared and filed a meritorious defence, and the case is on the appeal, it is too late to object to any irregularity in the proceeding, even if any such existed.

Assumpsit, from Schley county. Decision by Judge WORRILL, at August Term, 1858.

This was an action brought in Sumter county, by Henry J. Lamar, against Thomas P. Cottle of Sumter county, as maker, and Abner Burnam of Houston county, as endorser, of a promissory note.

The writ issued 29th January, 1856. The Sheriff of Sumter county returned "the defendant Thomas P. Cottle not to be found in the county. This 22d February, 1856." Burnam was served by the Sheriff of Houston county, 4th February, 1856.

Afterwards, at a subsequent Term of the Court, it was, on motion of counsel, "Ordered, that plaintiff have leave to withdraw the original declaration to perfect service upon the said Thomas P. Cottle, and that the Clerk of this Court do make out a copy of said writ, and the Sheriff be required to serve said copy upon said Thomas P. Cottle, at least twenty days before the next Term of this Court." The Sheriff returned that he had personally served Thomas P. Cottle, 19th February, 1857. At September Term, 1857, Cottle and Burnam both filed issuable pleas, and the case was transferred to the appeal by consent; and Cottle residing in that portion of Sumter county embraced and cut off into the new county of Schley, the case was afterwards by order of Court transferred to that county.

The case coming on for trial in Schley Superior Court, counsel for Burnam, moved to dismiss the case as to him, upon the ground that the return of *non est inventus* by the Sheriff of Sumter county, as to Cottle, prevented the jurisdiction of the Court from attaching as to him, Burnam.

The Court sustained the motion and dismissed the case as to Burnam.

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Counsel for Cottle moved that it be dismissed as to him, upon the ground that the order giving further time to perfect service on him, was null and void. The Court also granted this motion, and dismissed the case as to Cottle.

To which decisions counsel for plaintiff excepted.

HUNTER & ELLS; STUBBS & HILL, for plaintiff in error.

MCCAY & HAWKINS; and SCARBOROUGH, *contra*.

By the Court.—LUMPKIN J. delivering the opinion.

The writ in this case, was regularly sued out and returned. This was the commencement of the suit, and gave the Court jurisdiction. The Sheriff returned, that one of the defendants was not to be found, although in point of fact, he lived in the county, which fact was offered to be proved; and was, I believe, a member of the Legislature from that county, at the time. Time was asked for and allowed to serve him, which was done, in the county. The case was delayed, but did not abate. Both defendants came in and filed meritorious pleas. And yet after all this, the action was dismissed. This case does not fall within any of the provisions of the 8th section of the Judiciary Act of 1799, prescribing certain things to be done, and declaring the whole proceeding void, provided they are not complied with. A hard case of this sort has occurred during the present Term. One may well doubt the propriety of the construction originally put upon that Act. But it is too late to correct it, except by legislation, which has been partially done.

Under the 11th section of the Judiciary Act of 1799, giving the right to sue co-obligors and joint promissors in the same action, though living in different counties, it often happens that the non-resident defendant cannot be served in time. And leave is always granted to perfect service. Why

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should not the converse of the proposition be true; that is, where the resident defendant is not served?

The fact that the parties have pleaded to the action helps the case. And the Act of 1818, if rightfully interpreted, would save the case, as it would have done scores of cases heretofore.

Judgment reversed.

JESSE ROBSON, plaintiff in error, vs. ELIZABETH JONES, defendant in error.

[1.] When a man marries a wife entitled to an estate from her former husband, which he receives and promises to hold in common with that coming to her daughter, of whom he is guardian, and at the maturity of his ward, settle the same upon his wife, said contract is valid; and the fact of his holding the possession of the undivided property under such circumstances, will not be a reduction of it to possession, by him *as husband*: further the wife is entitled to the same by survivorship, at the death of her husband; and a Court of Equity will decree a settlement thereof for her benefit, even as against the creditors of the husband, and her claim constitutes a sufficient consideration to support an agreement between her and her son-in-law, as to the division of said property.

[2.] A decree for so much money will not be set aside, unless the Court is satisfied that it is excessive, and to an amount that will justify a renewal of the litigation.

[3.] A Court will hardly award a new trial in an important case, because testimony has been inadvertently admitted, which is wholly immaterial, and which it is apparent could have helped or hurt neither party.

In Equity, from Calhoun county. Tried before Judge ALLEN, at November Term, 1858.

This was a bill in equity, filed by Elizabeth Jones, against Jesse Robson.

The bill states that plaintiff first intermarried with Drury

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Stokes, by whom she had one child, Georgia Ann Stokes, the wife of defendant. After the decease of Stokes, plaintiff married James Jones, who became the guardian of her infant daughter; that her first husband left a considerable estate, and by agreement before marriage with Jones he was not to use any part of Stokes's estate, but the whole was to be kept together undivided in his hands, and plaintiff's share was not to be subject to his marital rights. That after their marriage, in pursuance of this agreement, all the estate of Stokes, which came into the hands of Jones, was returned by him, as guardian of the said Georgia Ann, one-half of which plaintiff alleges belonged to her.

The bill further states, that Jones purchased from funds received of the estate of Stokes, four negroes, Ned, Dolly, Louisa and Winny, all of which he mortgaged to the security on his guardianship bond, as an indemnity, and that Jones died in the county of Washington, in the year 1841, leaving his estate greatly embarrassed; that suit was instituted in equity by the surety on the guardian bond, to enjoin creditors and to enforce the prior rights and lien of the ward upon his estate, as provided by statute.

The bill further states that Robson, the defendant, who had intermarried with said Georgia Ann, and well knew that plaintiff was entitled to one-half of said estate, proposed that if she would interpose no obstacle, but would consent that said estate might be sold in satisfaction of defendant's claim against said deceased, as guardian of his wife, that he, *Robson*, would buy all the negroes, and plaintiff and himself would divide them; that confiding in Robson, plaintiff agreed to this arrangement, and the property was sold under a decree of the Court of Equity, and purchased by Robson at a very inconsiderable sum, which was credited on his demand; that shortly afterwards in fulfillment of said agreement, Robson turned over to plaintiff a negro girl named Louisa, which girl has been in plaintiff's possession ever since; and that Robson promised from time to time to

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carry out in full their agreement, but delayed and postponed the same, falsely representing that if said property was divided that plaintiff's share would be taken for the debts of her late husband; and the more effectually to deceive plaintiff, Robson induced her to sign a note to one Cain, which was put in suit and judgment obtained in a Justice Court, and transferred to Robson, who had all the perishable property belonging to plaintiff sold, and after buying it in, reconveyed it to her and her children.

The bill further states that Robson denies and repudiates said agreement, and claims the whole of said property, and has commenced his action of trover for the recovery of the girl Louisa, the only property which plaintiff has ever received under said agreement. That from the proceeds of the sale of one of said negroes, Robson bought two others, which with those purchased by him as aforesaid, he has had since 1845.

The prayer of the bill is, that an account be taken of the hire of said negroes, and that there be a partition of the same between plaintiff and defendant, according to said agreement.

The bill was amended, charging defendant with having received, as part of the estate of Drury Stokes, deceased, several tracts of land, which he had sold, and appropriated the proceeds to his own use, and to one-third of which plaintiff, as the widow of said Stokes was entitled.

Defendant answered the bill, and admitted that he married Georgia Ann Stokes, the daughter of plaintiff, but denies that Stokes died possessed of much property; does not know whether the estate was ever divided, but alleges that James Jones, the second husband of plaintiff, and guardian of Georgia Ann, received the effects, whatever they were, of the said estate, and believes that he made a division thereof, and retained plaintiff's share; knows nothing of any agreement between plaintiff and her husband, Jones, before or after marriage, and never heard of it until recently, and if

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there was one, believes it was in parol, and disregarded and forgotten, until recently, when such pretended agreement was thought to be of service in combatting defendant's rights; and that whatever property or funds said Jones returned and charged himself with, as guardian, defendant believes rightfully belonged to his ward, the said Georgia Ann; admits that Jones in his lifetime purchased the negroes named in the bill, but believes and charges that said negroes were purchased with the money of his ward, received from the estate of Nancy Stokes, the grand-mother of said Georgia Ann; that Jones mortgaged the negroes as mentioned in the bill; that after his death, Samuel Robson became the guardian of Georgia Ann, and he filed the bill in equity, seeking to sell so much of Jones's estate as would satisfy the claim of said Georgia Ann; that pending this proceeding defendant married said Georgia Ann, and was made a party to the bill, but he denies all knowledge of any claim of plaintiff to any part of the sum, that by the decree in said case was awarded to him, or that she had any rights or interests aside from that of her late husband, the said Jones, and denies that he ever made, or entered into any such agreement or arrangement as charged in the bill; states that he purchased the negroes referred to by the bill, at the sale made under the decree, and the amount of his purchases was credited on his judgment—never recognized any such contract as that set up by plaintiff, but from kind and friendly regard, allowed the girl Louisa to go into plaintiff's possession; denies all the charges in the bill in relation to any contract, false representations, or deceitful practices; denies the charge in relation to the note given by plaintiff to Cain; but avers that upon her earnest request, he bid in the property as charged in the bill, and conveyed it as she desired and directed; knew of no claim or title set up by plaintiff to the negro Louisa, until 1850 or 1851, when he immediately commenced suit for her. He also pleads the statute of limitations; &c.

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The case was submitted upon the pleadings, proofs and charges of the Court, and the jury found for plaintiff two thousand eight hundred and eighty-five dollars and forty cents.

Whereupon, defendant moved for a new trial on the following grounds, to-wit:

1st. Because the Court erred in not dismissing the bill for want of equity.

2d. Because the Court refused to dismiss the bill after the complainant closed the evidence on the ground: 1. That from the evidence of complainant, it was shown that complainant rested her recovery on the fact of combination between complainant and respondent, to defraud the creditors of James Jones, her husband, and that a Court would not interfere to compel an execution of the contract, and if executed would leave the parties where they were. 2. That from the bill and evidence, there was no consideration passing from complainant to respondent, on which the alleged contract or promise could be sustained.

3d. Because the Court erred in admitting in evidence the deed of gift by defendant to complainant and her children, of personal property; defendant objecting to it.

4th. Because the jury found contrary to the charge of the Court and the evidence.

5th. Because the Court erred in charging the jury that when a subsisting trust existed, that the statute of limitations does not commence to run until the trustee give notice of an adverse holding, and that it was proven that a subsisting trust existed, and it had not been proven that he had given notice of his adverse holding.

6th. Because the Court erred in charging the jury, that if they believed the contract as charged, was proven, they should find for complainant, one-third of the value of the property, and hire of one-third, after deducting the amount shown by James Jones's return, to have been received from the estate of Nancy Stokes.

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7th. Because the Court erred in charging the jury that if James Jones received the amount of the estate of Drury Stokes, and under an arrangement with his wife, to have no division until Georgia Ann became of age, and charged himself with it, as guardian of Georgia Ann, then it was not a reduction of Mrs. Jones' portion of Drury Stokes's estate, to possession, and it would in proper proceeding in equity, have been settled on her, and that this was a sufficient consideration to sustain the promise set up in complainant's bill.

8th. That the jury found contrary to law and equity.

9th. That the jury found contrary to evidence, and the weight of evidence, and the justice of the equity of the case.

The Court, after argument refused the motion for a new trial, and defendant excepted.

WARREN & WARREN, for plaintiff in error.

VASON & DAVIS, *contra*.

By the Court.—Lumpkin J. delivering the opinion.

We see nothing illegal in the contract set up, and sought to be enforced in the bill, between Mrs. Jones and Robson.

The agreement between Mrs. Jones and her husband, that he would keep the property together, which came into his hand, from the estate of her former husband, Drury Stokes, until her daughter Georgia Ann Stokes came of age, and then settle his wife's part upon her was a valid contract, and if Mr. Jones, as *husband*, failed to reduce his wife's share of this property to possession, as we think he did during his lifetime, the right to the property secured to her, and could be protected from liability at the instance of her husband's creditors. It is objected that the property had been converted into money, and that there could be no separate estate created in money; but a settlement can be made

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of money as well as of property, and so this Court decided in the case of _____ at Atlanta.

There was a good consideration for the undertaking between Mrs. Jones and Robson, to-wit: that if she would not interfere, which she was about to do, to assert her equity, that he would buy in the negroes under his decree, and divide them with her, and there is a superabundance of evidence to prove this contract, and of his distinct and oft repeated recognition of it.

It is complained that the Court erred in charging the jury, that the short bar of four years would not prevent this recovery, provided there was a subsisting trust in Robson for Mrs. Jones. The Court was right as to the law, and the proof fully warranted the charge.

As to the amount of the verdict, there is not sufficient certainty in the data upon which it is based, to enable us to test that very satisfactorily; but taking the most restricted view as to the right of Mrs. Jones in the negroes, we find her entitled, according to the best calculation we can make, to between \$2,600 and \$2,700, and the decree is for between \$2,800 and \$2,900; a difference too small when we look to the vagueness of the data, to justify this Court in saying that the finding was for too much.

What has seemed to be the smallest point in this case, has given us the most trouble, namely: the competency of that portion of the testimony which refers to the sale of the perishable property in the possession of Mrs. Jones, belonging to the estate of her deceased husband, under an arrangement fabricated between Robson and herself for that purpose; it neither helps her nor hurts Robson; it is a mere straw in the case. We dislike to subject those parties to a renewal of this family litigation, on account of this grain of mustard seed; this small dust of the balance.

Perhaps we may save our consciences by holding that it tends to show a disposition on the part of Robson to protect his mother-in-law in the enjoyment of the whole of the

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property left by her former husband; and thus a gleam or glimmer of light corroborative of the agreement which he made for that purpose; this is not the avowed object for which it was offered; that we never could comprehend. We can say no more for it, and this is very little.

Judgment affirmed.

McDONALD J. absent.

METHVIN S. THOMSON, plaintiff in error, vs. CHARLES MCCORDEL, defendant in error.

Money in Court, on a rule for its distribution, must be applied, as far as it goes, to the oldest lien attached thereon, provided there be nothing to affect the validity of the lien.

Rule against Sheriff, in Bibb Superior Court. Decision by Judge LAMAR, at May Term, 1858.

Charles McCordel held a *fi. fa.* against Richard A. Benson, dated 7th July, 1857. The Sheriff of Bibb county, under this *fi. fa.*, sold a horse, the property of Benson, for \$50 50. Upon a rule to show cause why he should not pay this money to plaintiff in said *fi. fa.*, the Sheriff answered, that one Methvin S. Thomson had placed in his hands, four Justice Court executions, amounting to more than fifty dollars, and upon which said Thomson claimed the money arising from the sale of the horse; these *fi. fas.* were in favor of George W. Warner vs. James Vanvolkenburgh, principal, Richard A. Benson, endorser, and James D. Vanvol-

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enburgh, security on stay; all dated 22d September, 1852, and assigned to Thomson 30th September, 1853.

Thomson, the owner of the Justice Court *fi. fas.* was examined by plaintiff, who testified that James D. Vanvolkenburgh, the security on stay, had mortgaged to him certain property, to secure a debt of seven or eight hundred dollars; finding that these justice executions were outstanding, he procured a transfer of them to himself; he then foreclosed his mortgage, and sold the mortgaged property for a little over five hundred dollars, which was credited on the mortgage *fi. fa.*; this entry was made at the request and by the consent of the mortgagor; the justice *fi. fas.* are older than the mortgage; the sale of the mortgaged property was made in 1855.

It was admitted that the note due to McCordel, (and I suppose upon which his judgment was obtained, Rep.) was dated 16th May, 1855.

After argument, the Court ruled and decided that McCordel's *fi. fa.* was entitled to the money in the Sheriff's hand, in preference to the justice's *fi. fas.*; to which decision Thomson excepted.

STUBBS & HILL, for plaintiff in error.

SPEER & HUNTER, *contra.*

By the Court.—McDONALD J. delivering the opinion.

The execution claiming the money in this case, and issued on the oldest judgment against the property, which produced the money in Court for distribution, had never been interposed to claim the money raised on the mortgage *fi. fa.* and withdrawn; it was an older lien on the mortgaged property, and the mortgagee had a right to purchase it to protect his security; it was the oldest judgment against the property, raising the fund now in Court, and there being noth-

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ing in the case to affect the validity of its lien on the property, the Court below ought to have ordered the money to be applied to its payment, as far as it would go.

Judgment reversed.

ASA MARSHALL, administrator, plaintiff in error, vs. **THOMAS J. DRAWHORN**, defendant in error. ^{27 275}
_{126 335}

When a party seeks to reform a contract, he should state distinctly what the true agreement was, which was intended to be expressed in the writing; and if the bill alleges contradictory statements, the defendant is entitled to abide by that most favorable to him.

Patent defects, to which the attention of the buyer is called, and against which he disclaims all purpose of holding the seller responsible, are not covered by a warranty of soundness.

In Equity, from Taylor county. Decision on demurrer, by Judge WORRILL, at October Term, 1858.

This was a bill in equity, to reform a written contract, (bill of sale of a negro,) and to enjoin an action at law; bill filed by Thomas J. Drawhorn against Asa Marshall, administrator of James M. Marshall, deceased.

The bill states, that on the 14th day of August, 1854, Drawhorn sold a negro boy named Edmund to James M. Marshall, for \$800, and executed a bill of sale containing a clause warranting said negro to be "sound and healthy, both in body and mind." That Marshall has since commenced his action at law against complainant, for a breach of this warranty; that said warranty was inserted in said bill of sale, under the following circumstances: Marshall came to the house of plaintiff; the negro was confined to a tree in the yard, and pending the negotiation, plaintiff called his atten-

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tion to his stiff neck, and informed him that he had been recently whipped, and that he would not warrant as to the stiff neck and whipping. Marshall agreed to take the negro at \$800, and wrote the bill of sale, which plaintiff objected to signing, stating that he would not warrant the soundness of the boy in body; Marshall replied that that was the usual way of writing bills of sale, and as there were witnesses present, who heard the trade, there would be no difficulty about it, and that he would never enforce said warranty; whereupon, plaintiff signed the bill of sale as prepared by Marshall, which he never would have done but for this statement and representation.

That since the commencement of the action at law, James M. Marshall has departed this life, and Asa Marshall, his administrator, made a party.

The bill further charges fraud in procuring the bill of sale.

The bill was amended, stating that plaintiff was not aware of the legal effect of said bill of sale, and was assured by Marshall that it was a mere matter of form to convey the title, and it was solely on this representation that he signed the bill of sale.

The bill was further amended, stating that said bill of sale was executed under a mistake, and by the fraud of Marshall, it being the contract that said negro, being sold at a reduced price, was not to be warranted as to his neck or the consequences of the whipping which he had just received; and after urging plaintiff to sign, Marshall agreed and promised that said warranty should never be enforced as to the diseased neck and the whipping.

To this bill the defendant demurred. The Court overruled the demurrer, and defendant excepted.

COOK & MONTFORT; SMITH & POU, for plaintiff in error.

CORBITT; and HILL & STUBBS, *contra.*

By the Court.—LUMPKIN J. delivering the opinion.

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Drawhorn sold James Marshall, the intestate of Asa Marshall, the defendant, a negro boy by the name of Edmund, sixteen years old, for \$800. He warranted the soundness of the negro, as well as the title. The boy's health failing, Marshall sued Drawhorn for a breach of his warranty. This bill is filed to reform the bill of sale, and to aid in the defence of the action at law.

The bill is demurred to, and of course, the facts charged in it are admitted to be true. In a bill of this sort, the complainant must state distinctly wherein the contract, as it is written, fails to express the intention of the parties. The trouble in this case is, to ascertain what is the error alleged to exist in the original contract. In one place it is charged, that the bill of sale was only designed to warrant the soundness of the slave's mind, and not of his body. It is elsewhere averred, and that in two or more places, that there was to be no warranty at all, so as to impose any liability upon the complainant; and that it was only inserted under the assurance of Marshall that the warranty was always incorporated in instruments of this sort, and that it was necessary to convey the title. Well, here are two contradictory statements, as to the defects in the paper which is sought to be rectified.

But there is another argument set forth in the bill, with more fullness than either of the foregoing; and which we have no doubt expresses the truth of the case as it transpired. When Marshall came to the house of Drawhorn, where this trade took place, he found the boy tied to a tree. He had been severely whipped. A negotiation for the purchase of the negro was started. Drawhorn called the attention of Marshall to the flogging, and remarking that he did not wish to cheat him, informed him that the negro had a stiff neck; and walking up, turned the negro's head about as well as he could.

In referring to the transaction in the amended bill, the complainant says: "Before the execution of the bill of sale,

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it was the contract and agreement, by and between complainant and said James M. Marshall, that said negro was sold at a reduced price, and that said complainant was not to warrant the soundness of said negro, as to any disease of his neck, or in consequence of any whipping the said negro had just received," &c. And again, "Joshua Tennison, who was present, and professed to be well acquainted with the forms and effects of such conveyances, and satisfied your orator that, in as much as it was the contract that your orator was not to warrant the negro, as to his diseased neck, or as to the effect of the whipping he had received; and in as much, he said, as the said James Marshall then and there promised before witnesses, that said warranty as to the neck and whipping should never be enforced against your orator, your orator concluded he had been mistaken, and executed said bill of sale," &c.

The complainant appended to the original, the answers of Joshua Tennison to interrogatories, in the common law action, and made them a part of his bill. This witness swears, that he was present when the trade took place; "that defendant told plaintiff that he would warrant said boy sound, with the exception of a stiff neck, and a whipping which he had just given him, which he could see for himself." Further answering, he says, "the defendant told plaintiff he would warrant the boy sound, except the whipping and the stiffness of the neck," &c.

It is a well established rule, that the pleadings are to be taken most strongly against the pleader. And under this rule, the defendant would be entitled to take the weakest case stated against him in the bill. But that need not be insisted on. Is not the omission to except, in the bill of sale, the stiff neck and the whipping, the one which stands out most prominently in the bill. This is the contract, asserted and reiterated by the complainant himself, and sworn to be true, but distinctly proven by the depositions of Tennison attached to the bill and made a part thereof. We think there can be

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no doubt upon this point. The complainant swears, that he knew of no other defects; he spoke of no other. What motive then had he for refusing to warrant against any other? Can it be questioned, that if the warranty had contained this exception, it would at the time have satisfied Drawhorn. And without a warranty, except as to these, which were known to Marshall, and treated lightly by him, he never would have given \$800 for the boy. If Drawhorn knew of any other and concealed it, he was guilty of a fraud upon the purchaser, and not entitled to relief.

This then being the case made by the bill, by a proper construction of it, is it necessary to reform the bill of sale as to these defects, in order to protect the complainant against the suit upon his warranty? He is amply protected already, and such will be our judgment in this case. The warranty does not extend to these defects, which were pointed out at the time, and expressly agreed not to be complained of. If these be the unsoundness sued for in the action at law, the plaintiff is not entitled to recover, whether the stiff neck be an original deformity, or one superinduced by some supereminent cause which has long since passed away, but which, however, has left this permanent effect behind, Drawhorn is not liable for it.

If, however, the boy had other disease, and this stiff neck was only the manifestation or development of the secret malady, the seller will not be protected, and ought not to be.

It is due to Judge WORRILL to say, that he may have overruled the demurrer in this case, on the ground that the whipping and stiff neck were within the warranty. For this Court held, in *Calloway and Jones*, 19 Ga. Rep. 277, upon the authority of 1 *Parsons on Contracts*, 459, and the cases there cited in the note, that a general warranty of soundness *might* cover patent defects. But it is confined to those cases of doubt and difficulty where the purchaser relies on his warranty, and not on his own judgment. But this is not that case. For here his attention was called by the seller to the

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two defects, and he not only paid a less price for the negro on that account, but disclaimed all purpose of holding Draw-horn responsible for them.

We were first inclined to suffer the bill to stand for a hearing, so as to let the warranty be reformed to the extent indicated in this opinion, provided the proof made out the case. But seeing that we could greatly curtail expense and litigation, by disposing of the bill, and letting the common law action be tried, with the judgment of this Court that the warranty did not cover the whipping and the stiff neck, we concluded that it was best to give the latter direction to the case. This is a power conferred upon this Court, but which the Circuit Judge did not feel at liberty to exercise. I say this in further vindication of his opinion.

Decree:—The case made by complainant's bill is, the failure to insert in the warranty of soundness, an exception as to the stiff neck of the boy, and the effects of the whipping just inflicted upon him. And it is the opinion of this Court, and it so adjudges, that for these the seller is not liable upon his warranty.'

RICHARD ROE, casual ejector, and BENJ. L. COOK, tenant in possession, plaintiffs in error, vs. JOHN DOE, ex dem., THOMAS LONG and JOHN MALCOLM, defendants in error.

- [1.] One going into possession of land, under a parol purchase, can only hold to the extent of his actual possession.
- [2.] Notwithstanding the tenant may have had possession for seven years, yet if he disclaims having title, and declares he is only waiting to purchase of the true owner, when he can find him, the statute will not protect him against the rightful owner of the fee.

Cook vs. Long and Malcolm.

Ejectment, from Randolph county. Tried before Judge KIDDOO, at June adjourned Term, 1858.

Plaintiff introduced in evidence a grant from the State to Thomas Long, for the lot of land in dispute, and a deed from Long to himself. He also read the depositions of two witnesses, taken by commission, which it is not necessary to set out. He proved that defendant, Cook, was in possession at the commencement of the action, and closed.

Defendant, amongst other things, proved that he went into possession of the land in 1842, and had remained in possession ever since; had lived on it, cleared a portion of it, cultivated it, cut timber; that he had about fifteen acres enclosed and under fence; been under fence since the first of 1848.

After the close of the testimony, defendant's counsel requested the Court to charge the jury, that if they believed from the evidence that defendant purchased the land by parol contract, in 1842, and went into possession under said contract, and had remained in quiet and peaceable possession for more than seven years, using and claiming the land as his own, then they should find for the defendant. Which charge the Court refused to give, and defendant excepted.

The Court then, amongst other things, charged the jury, that defendant, to protect his title under the statute of limitations, must either have a paper title, or have the land enclosed, or the boundaries distinctly marked out; that a parol contract of purchase of the whole lot would not be sufficient.

The Court further charged, that even if the defendant had been living on the land, using and claiming it as his own, since the year 1842, yet if, at any time during the seven years upon which he relied for statutory title, he disclaimed title, or said he would buy the land when the true owner came, he could not be protected by the statute of limitations, even for that portion which he had enclosed and in cultivation. To which charges defendant excepted.

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That portion of the above charge relating to a parol contract of purchase, and disclaimers and admissions of defendant, has reference to the testimony of certain witnesses examined by commission.

DOUGLASS & DOUGLASS; and E. H. BEALL, for plaintiff in error.

PERKINS, *contra.*

By the Court.—LUMPKIN, J. delivering the opinion.

[1.] The Court was right in refusing to give the first charge as requested. For conceding that possession, under a parol purchase, may ripen into a statutory title, still the evidence in this case would restrict it to the actual possession. And having no paper title, the defendant could not be protected beyond his *possessio pedis*.

The Court, we hold, laid down the rule of law correctly, in the first charge as given, and as applicable to the facts of this case, namely: that the defendant, to protect his title under the statute, must either have a paper title, or have the land enclosed, or the boundaries distinctly marked out. And not a parol contract of the purchase of the whole lot.

[2.] It is true, the evidence showed that the disclaimer in this case of having title, was made after the seven years had run. But what of that? We think it just as good to deprive the defendant of his statutory defence, as if made within the seven years. And the defendant was not hurt by the assumption on the part of the Court, that the disclaimer may have been made within the seven years. On the contrary, the jury examining the testimony and finding it was made afterwards, may have thought that it was not sufficient to oust the defendant of the benefit of his possession. And so may his Honor have supposed. But we think differently. Suppose the maker of a note promise to pay after the six years have

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run, will not this take it out of the statute? Surely. Why not a disclaimer of title to land, even after seven years possession?

Judgment affirmed.

McDONALD J. absent.

[27 283
129 385]

THE COLUMBUS OMNIBUS COMPANY, plaintiff in error, vs.
PAUL J. SEMMES, garnishee, defendant in error.

Evidence which *tends* to establish the issue, is admissible, although not of itself sufficient for that purpose.

Garnishment, from Muscogee county. Decision by Judge WORRILL, at November Term, 1858.

The Columbus Omnibus Company brought suit against the Manufacturers and Mechanics Bank, and pending suit served Paul J. Semmes with a summons of garnishment.

The garnishee answered that he was not, at the time of the service of said summons, and had not been since, indebted to said bank, nor did he have, at the time of said service, nor has he had since, any property or effects of said bank in his hands.

Plaintiff traversed this answer, and the issue, was submitted to a jury.

Plaintiff's counsel offered to read from the minutes of the Manufacturers and Mechanics Bank as evidence, the following, *to-wit*:

May 8th, 1852. Received of the commissioners, G. E. Thomas, J. C. Cook, Hervey Hall, Joseph B. Hill, a certificate of deposit on the Agency of the State Bank of Georgia,

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for twenty-five thousand dollars, dated the sixth day of April, 1852, the *same* being the ten per cent. on the capital stock of said Banking Company, paid to said commissioners on said 6th April, 1852.

(Signed,) B. A. THORNTON,
 PAUL J. SEMMES,
 DOZIER THORNTON,
 JOSEPH KYLE,
Directors.

Also, the following:

“ COLUMBUS, GA., May 8th, 1858.

The commissioners appointed by the Legislature to superintend the election of Directors of the Manufacturers and Mechanics Bank of Columbus, having met this day and certified to the election by the stockholders of the following named persons as directors, to-wit: Paul J. Semmes, Sterling F. Grimes, Dozier Thornton, Joseph Kyle and B. A. Thornton; they, the Directors above named, met for the purpose of organizing the board, when, on motion of P. J. Semmes, Dozier Thornton was called to the Chair, and Robert B. Kyle requested to act as Secretary.”

“ It was then on motion, ordered that the board of Directors proceed to the election of a President and Cashier of said bank. Whereupon, on counting out the ballots, it appeared that General Paul J. Semmes was duly elected President, and Robert B. Kyle duly elected Cashier.” (Then follows the oaths administered to the President and Cashier.)

“ Robert B. Kyle then tendered his bond with two securities for the performance of his duties as Cashier, which was accepted. It was then ordered that certificates of stock be issued to the stockholders for the several amounts of their subscription.”

“ It was then on motion of B. A. Thornton, ordered that the notes of the stockholders, for the amount of their several subscriptions actually paid in, be discounted, the notes to

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be payable within thirty days after demand by the President of the bank."

"On motion of Dozier Thornton, the board then adjourned to meet, subject to the call of the President.

(Signed,) R. B. KYLE, Sec'y."

D. THORNTON, Chm'n.

Also, the following, to-wit:

"COLUMBUS, GA., April 5th, 1852.

We, whose names are hereto subscribed, agree to take the number of shares opposite our names in the capital stock of the Manufacturers and Mechanics Bank of Columbus, and to comply with all the terms of the charter, agreeably to an Act of the Legislature, approved January 27th, 1852, to incorporate a bank in the city of Columbus, to be called The Manufacturers and Mechanics Bank of Columbus.

<i>Stockholders' Names.</i>	<i>Number of Shares.</i>
Paul J. Semmes, - - -	Fifteen hundred.
Dozier Thornton, - - -	Four hundred.
Robert B. Kyle, - - -	Two hundred.
B. A. Thornton, - - -	Thirty shares.
Sterling F. Grimes, - -	One hundred.
Joseph Kyle, - - -	Thirty shares.
Robert B. Kyle, - - -	Two hundred and forty."

To the introduction of all which, counsel for garnishee objected, on the ground, that the same was irrelevant; garnishment not being the proper remedy.

The Court sustained the objection, and rejected the evidence, and counsel for plaintiff excepted.

W. DOUGHERTY, for plaintiff in error.

JOHNSON & SLOAN, *contra.*

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By the Court.—LUMPKIN J. delivering the opinion.

The plaintiff offered, all at the same time, sundry pieces of evidence, going to show the organization of the Manufacturers and Mechanics Bank, the payment in of the \$25,000 required by the charter before transacting any business, and an order of the board of directors to the effect, that each stockholder be allowed to discount his note to the amount of his stock, payable thirty days after demand by the President. Paul J. Semmes, the defendant, was the President, and a stockholder to the amount of fifteen hundred shares.

The testimony was objected to and ruled out, upon the ground, that it was irrelevant, *because garnishment was not the proper remedy in this case.* Had the proof gone one step further, showing that in accordance with the order of the board, Semmes had borrowed \$15,000, and given his note for the amount, and there stopped, the case would have been fully made out. He would be convicted undoubtedly of being a debtor to the bank for that sum. True, the development of *all* the facts in the case, might have shown that garnishment was not the proper remedy. But the objection was premature. As far as the evidence went, *it tended to demonstrate the issue, to-wit; that Semmes was a debtor to the bank.* We repeat, had the proof gone one step further, and established that he got \$15,000, and gave his note for it, the evidence would have been complete. And without this, that which was offered would have amounted to nothing.

It is not the practice of the Courts to require all the testimony to be introduced or even disclosed at once. The holder of a bankable note, sues the endorser. He first offers the note. It is admitted without proof of demand and notice, a recovery cannot of course be had. Still the note is always introduced without objection. The plaintiff in ejectment, begins by offering a grant from the State to the land in dispute. Instead of showing title *in* the plaintiff, it

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shows paramount title *out of* him; as does every intermediate conveyance perhaps, until you reach the deed under which he claims. Still he is always permitted to proceed; and to begin at either end of the chain tracing his title from the State down to himself, or from himself up to the State.

But here as the record shows, the objection was not to the relevancy of the testimony generally, which is the question argued before us. But it was rejected distinctly upon the ground, that the common law remedy in this case, did not lie. Now whether this be so or not, the objection came too soon.

Judgment reversed.

THOMAS THOMAS, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

27	287
88	557
27	287
102	508
27	287
e125	140
27	287
e130	310

- [1.] Popular excitement alone, not sufficient of itself to postpone the trial of a case, except under extraordinary circumstances.
- [2.] If there be not a full panel, the challenge should be made to the array.
- [3.] A juror upon his *voir dire*, and in answer to the question, "Is your mind perfectly impartial between the State and the accused?" Answers, "I think that I am, as I understand it." The Court then asks, "do you understand the question?" The juror replies, "yes;" He is an impartial juror, and there is no objection to the mode adopted for testing his indifferency.
- [4.] A juror may be disqualified and set aside for cause, on the ground, that he is over age, after the statutory questions have been propounded to him, provided the State has not been prejudiced by the irregularity.
- [5.] It is not necessary that the juror should be a citizen of the county, where the offence is tried for any specified time previously. It is enough, if he be a *resident citizen*, at the time of trial.
- [6.] The Court being satisfied from inspection, that a juror is drunk, may set him aside of its own motion.
- [7.] It is no objection, that a traverse jury in a criminal cause is present, and bears the Court charge the grand jury upon the penal laws of the State gen-

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erally ; and compliment them upon their vigilance in ferreting out crime, and bringing offenders to justice.

[S.] The practice of separating witnesses in a State case, is ancient and salutary; still it is a matter of discretion with the Courts. And it is no abuse of that discretion, to allow one or more of the witnesses to remain in Court, and aid either the State or the accused, in conducting the prosecution or defense; neither does it disqualify a witness from being *re-examined*, that he has remained in the Court room after he was first examined, or that he has stated to another witness, what he had sworn to; although this last, is a misconduct, which might subject him to the punishment of the Court.

[9.] What the defendant says on the spot, within a minute or a minute and a half, or even three minutes after the transaction, is a part of the *res gestae*, and admissible as such in evidence.

[10.] When the behavior of a witness is unbecoming, it is the duty, as well as the privilege of the Court, to reprove him for his indecorum.

[11.] When a witness testifies to a fact, as that the deceased was advancing on the accused when he was killed, he may give the reasons of that opinion.

[12.] When the relative position of the several combatants in an affray is material the State may reintroduce a witness examined in chief to prove that it is different from that testified to by the defendant's witnesses, and exhibit to the jury a diagram, illustrative of his statement, and then the defendant to rebut in the same way.

[13.] When the Court is asked to change a certain principle to be law, provided the evidence sustains it, it is no error in the Court to give the opposite, or other alternative, provided the proof preponderates on that side.

[14.] An outlaw not entitled to the privilege of a new trial.—LUMPKIN, J.

Murder, from Lee county. Tried before Judge ALLEN, January, 1858.

Thomas Thomas, the plaintiff in error, was indicted for the murder of Joseph Cross. He was tried at the January adjourned Term, of Lee Superior Court, and convicted. Whereupon his counsel moved for a new trial, upon the following grounds.

Grounds for New Trial.

1st. Because the Court refused the motion for a continuance, based upon the grounds of great public excitement against the prisoner, the homicide having been committed on the 5th of December, 1857, and that prisoner having been

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confined in jail, had no opportunity to prepare for his trial. The Judge remarks, upon this ground, "that the witness coming into Court, suspended this motion, and it was not again presented."

2d. Because when the second panel of jurors was put upon the prisoner, one of the jurors was absent, and did not answer to his name when called, and said panel was put upon prisoner, consisting of only forty-seven jurors. The Judge adds, "that the entire list was called over, and the Court remarked, that all the panel had answered, so believing; no objection was made."

3d. Because the name of one of the jurors, (Carlton B. Calloway,) was twice inserted in the panel, thus reducing the number to forty-six. The Judge adds, "It was a mistake, not discovered, the juror answering twice."

4th. Because one of the jurors, upon his *voir dire* in answer to the question, "is your mind perfectly impartial between the State and the accused," said, "I think that I am, as I understand it." The Court then asked him if he understood the question, he answered, "yes." To which prisoner objected.

5th. Because upon one of the jurors, after the statutory questions had been put to him, being put upon the prisoner, counsel proposed to ask him, if he was not over sixty years of age. The Court refused to permit the question to be asked, and the prisoner was forced to exhaust a challenge upon him. The fact being that the juror was over sixty years of age.

6th. Because one of the jurors had not resided in the county six months, and the Court refused to allow prisoner's counsel to examine him upon his *voir dire*, as to this point, until he first objected to the juror, and stated the grounds of his challenge.

7th. Because one of the jurors, upon the suggestion of Mr. Hawkins, of counsel for the State, was set aside by the Court for cause, upon the ground, that he was intoxicated; the

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Court first inquiring of counsel for prisoner, if the juror should be set down for cause, and counsel replying, that "the Court can see he is drunk."

8th. Because the Court in the presence of the jury empaneled to try prisoner, in its charge to the grand jury, remarked, among other things, "that almost all the homicides committed in the county, could be traced to the carrying of concealed weapons, and that it was high time that a stop was put to the commission of such offences."

9th. Because after the witnesses were sworn, and by order of Court, were separated, the Court allowed two of the witnesses for the State to remain in Court to assist in the prosecution, and to which prisoner objected.

The Court also, permitted two of prisoner's witnesses to remain to assist in the defence.

10th. Because the Court refused to allow prisoner to prove, by Samuel Lindsey, a witness on the part of the State, that prisoner said, about one minute or a minute and a half after he shot deceased, and as he turned and was leaving the place, that he "wanted witness to protect him," and said that he "had done nothing but what he was compelled to do in self defence." The Court holding it incompetent testimony.

11th. Because counsel for prisoner asked Green Cross, a witness on the part of the State, for what purpose he brought the pistol to town that day, and witness starting to answer what he had understood, when counsel for the State objected to his stating what he had understood, and the Court ruled it incompetent.

12th. Because the Court refused to allow prisoner to prove by the witness, Wilkerson, that prisoner said, from one to three minutes after the shooting, "that he did not intend to shoot deceased, but to shoot W. G. Cross."

13th. Because the Court remarked in the hearing of the jury, to the witness, Wilkerson, who was almost constantly laughing, "that his manner of testifying was very unbecoming, and that the Court was surprised to see him manifest so much

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levity in a cause of so much solemnity;" he being a witness for prisoner.

14th. Because the Court refused to allow prisoner to prove by the witness, Morgan, what he, witness, said to deceased, in reply to which deceased said, "I am not after Charley Spence, but am after Jim Spence, the damned Methodist preacher, and Tom Thomas."

15th. Because the Court refused to allow Gill, a witness, to state the facts which led him to believe that deceased and Green Cross were advancing on prisoner, witness having stated that they were so advancing.

16th. Because the Court allowed the State to introduce Sam. Lindsey, in rebuttal, who was the first witness sworn on the part of the State, and had remained in the Courtroom and heard all the testimony. Prisoner objecting to his re-examination.

17th. Because the Court permitted the witness, Lindsey, upon his re-examination, to make and exhibit a diagram, showing the position of the parties at the time of the shooting. Prisoner objecting that such testimony was not in rebuttal, and that said diagram was incompetent evidence.

18th. Because the Court refused to allow prisoner to prove in reply, that said diagram was incorrect; and also, refused to permit his witnesses to make a diagram, showing Lindsey's diagram to be incorrect. Counsel for prisoner stating that they had intended to have the witnesses make a diagram, but had unintentionally omitted it. The Court holding that when the prisoner closed, he could introduce no more testimony.

19th Because one of the witnesses for the State, after he had been sworn and testified, related to another witness for the State before he was examined, what he, the first witness, had sworn. "But this was unknown to the Court," adds the presiding Judge.

20th. Because the Court, in the hearing of the jury, and while said trial was pending, in discharging the grand jury stated among other things, that the criminal docket was very

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heavy, and on the increase, and it was attributable to their vigilance in bringing offenders before the Court; the only way in which crime can be suppressed.

21st. Because the Court charged the jury, as requested by prisoner's counsel, "that if the jury should believe that the deceased and Green Cross were acting together in a common purpose, to assault the prisoner, and the assault of either was of such a character as to have aroused the fears of a reasonable man at the time the prisoner shot the pistol, so that the prisoner had good reason to apprehend that his life was in great peril, by reason of such assault, then the law would justify the prisoner in shooting at either assailant;" stating to the jury at the same time, "that he gave it, (the charge) with a qualification, that would be stated in the subsequent charge," but which the Court failed to do. (*See charge.*)

Charge of the Court.

If you believe from all the evidence that the prisoner held the pistol in a threatening position, against or towards Joseph Cross, the deceased, and that Green Cross, a son of the deceased, seeing the danger of his father, drew a pistol and attempted to shoot the prisoner, that circumstance is no justification of the prisoner for shooting at either of the Crosses; if you should be satisfied from the evidence, that the prisoner had gone there, engaged in the contest, and had drawn his pistol in a spirit of revenge, and not in his own defense to save his own life or upon deliberation. If you are satisfied from the evidence, that the prisoner did kill Joseph Cross, then it is no justification to him, that Joseph Cross did commence the conversation with Charles Spence, which led to the quarrel; or, that Joseph Cross, the deceased, some two weeks before, or longer or shorter, had drawn his gun on him, the prisoner; unless the prisoner at the time, did not act with deliberation, or in the spirit of revenge, but in good faith or on the fear of a reasonable man, that unless he did shoot, he would lose his own life. But if the shooting, whether he

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shot at the one Cross or the other, was done by him in a spirit of revenge, or with deliberation, that is if prisoner went there with his pistol, prepared to shoot, and for the purpose of shooting, and not to defend himself or to protect his own person, the killing was murder, and not manslaughter or justifiable homicide.

22d. Because the Court charged the jury as requested by counsel for the prisoner, "That if at the time the prisoner shot, he was under the necessity of shooting to protect his own life, he is not responsible for the consequences resulting from such an act." Which charge he said he gave with a qualification, hereafter to be given, which qualification he never gave. (*See charge.*)

23d. Because the Court charged the jury as follows: that if they are satisfied from the evidence, that prisoner did kill Joseph Cross, then it is no justification to him, that Joseph Cross did commence the conversation with Charles Spence, which led to the quarrel; or, that Joseph Cross, the deceased, some two weeks before, or longer or shorter, had drawn his gun on prisoner; unless the prisoner at the time, did not act with deliberation, or in the spirit of revenge, but in good faith or on the fears of a reasonable man, that, unless he did shoot, he would lose his own life. But if the shooting, whether he shot at the one Cross or the other, was done by him in a spirit of revenge, or with deliberation, that is if prisoner went there with his pistol prepared to shoot, and for the purpose of shooting, and not to defend himself or to protect his own person, the killing was murder, and not manslaughter, or justifiable homicide.

24th. Because the jury found contrary to law.

25th. Because the jury found contrary to evidence.

26th. Because the jury found contrary to the charge of the Court.

27th. Because the Court charged the jury as follows: That it was their duty to reconcile the testimony if there be any conflicting, and ascertain the truths therefrom; in doing

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so you will look to all the facts and circumstances shown by the proof, the testimony of each witness, and his manner of testifying.

The Court refused the motion for new trial, and counsel for prisoner excepted.

WARREN & WARREN; STROZIER & SMITH; VASON & DAVIS,
for plaintiff in error.

Sol. GEN. and HAWKINS, *contra*.

By the Court.—LUMPKIN, J. delivering the opinion.

The defendant being convicted of murder moved for a new trial on twenty-seven grounds. His application being refused he prosecutes his writ of error to this Court, to reverse the judgment.

[1.] There was a motion made to continue the cause, and we infer, for the record is somewhat obscure upon this point, that it embraced two grounds, to wit: 1st. The popular excitement preventing the prisoner from having a fair trial; and 2d. The absence of witnesses. Pending the motion the witnesses came in; and there seems to have been no formal decision by the Court upon the other ground. As the trial was directed to proceed, we will assume in favor of the prisoner, that it was overruled.

This Court has never in any case held, that public excitement alone, was sufficient of itself to entitle the accused to a postponement of his cause. There might possibly be a case which would authorize and require it. The presiding Judge thought that this was not such a case, and we are not disposed to control his discretion.

[2. and 3.] As to the next two objections, as to the empanneling of the jury, we think they came too late. The defendant was furnished with a list of the jurors, and if the panel was not full, he should have challenged the array on that account. He was himself in laches. Besides, this was

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not the first, but the second panel, and it is not clear under the Act, that any subsequent panel after the first, might not suffice, although less than forty eight.

[4.] We see no error as to the mode of testing the impartiality of the juror, John E. Ward. And we are clear, that he showed himself qualified by answers, to serve as a juror.

[5.] Can a juror be disqualified from non-age or being over age, after the statutory questions have been asked him ? The Act of 1856, would indicate that objections of this sort should be previously made, and had any injury in this case resulted to the State, from not following the directions of the Act, we might hold that the challenge came too late. Otherwise, we are not prepared to say, that should the defect be discovered after the statutory questions have been propounded, as that a juror is not a free white citizen, that he is a minor, idiot, &c., that advantage might not be taken of it at any time. It being conceded, then, that the juror, Elbert Nichols, was over sixty, we think the objection was good when made, and that the Court erred in not allowing it. *Pamphlet 1856, p. 230.*

[6.] By the Act of 1856, it is not necessary that the juror should have been a citizen of the county, where the offence is tried, for any specified time. It is enough, that he is a *resident citizen* at the time of the trial. *Ib.* We consequently hold that Ennis was a competent juror.

[7.] The Court being satisfied from inspection, that Jeremiah Bentley was drunk ; and counsel for the prisoner, (Judge Lott Warren,) not disputing the fact, he was properly set aside by the Court for cause.

[8.] The eighth assignment is, " because on Monday morning last, the jury having been empaneled to try the said cause, was present in the Court room, and heard the Court charge the grand jury on the penal laws of the State, in which charge the Court elaborated strongly against crime, saying, amongst other things, that almost all the homicides committed in the county could be traced to carrying conceal-

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ed weapons; and that it was high time that a stop should be put to the perpetration of such offences." Well, what of that? The crowd that press into the Court House at the opening of the session, and the two petty jury panels, hear the regular charge on Monday morning; and it is from these by-standers, and the two petty juries, that traverse juries are selected to try offences. And whoever supposed that this constituted a ground of exception?

[9.] "Because, after witnesses for the State were sworn, prisoner asked and required of the Court to have them separated. Then prisoner's witnesses were sworn, and counsel for the State asked to have them separated. All of which the Court directed to be done. Counsel for the State then requested that W. G. Cross and Samuel Lindsey, witnesses for the State, and John G. Brown, a witness for the defendant, might be permitted to remain in Court to aid State's counsel in the prosecution. And this was allowed; and defendant by his counsel excepted." The Court adds, that "two of prisoner's witnesses were suffered to remain to assist in the defense."

We see no error in this assignment. For notwithstanding the practice of separating witnesses, may be very old, certainly as ancient as the trial of Susanna by Daniel, (*Apocrypha, History of Susanna, 52 verse;*) and very good, as it proved itself to be on that occasion; confounding her guilty accusers and vindicating her innocence. Still, it is but a rule of the Court, and must in its enforcement be left very much to judicial discretion. We see no abuse of that discretion in this case. The part that the witnesses, W. G. Cross and Lindsey bore in this examination, will fully sustain our opinion.

[10.] We think the Court erred in not allowing the witness, Samuel Lindsey, to testify to the sayings of prisoner, a minute or a minute and a half after the shooting. If the declarations were not a part of the *res gestae*, then nothing is;

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and all that Courts and text writers have said upon this vexed subject, is meaningless, 11, *Ga. Rep.*, 621; 22 *ib.* 228.

[11.] This assignment is abandoned. As it stands, the Court unquestionably ruled right. Counsel state that it is miscopied, and that the decision was exactly contrary to what is written.

[12.] We think the declarations of the defendant, as testified to by James W. Wilkerson, made from one to three minutes after the shooting, to the effect, that he shot at Wm. G. Cross, the son, and not Joseph Cross, the father, should have been admitted. The father was nearer the prisoner than the son. Some of the witnesses depose, that the deceased was not more than a foot and a half from a direct line from Thomas to the son. Thomas was agitated, and fired hastily. Perhaps his fire was drawn by the bursting of the cap of young Cross.

Learned counsel eloquently argue, that the by-standers may have been mistaken, but the pistol was its own best interpreter, and yet we know that it will not do to hold that every man aims at what he hits, or always hits what he aimed at.

[13.] We see nothing wrong or censurable in the reproof administered by the Court to the witness Wilkerson. The dignity and decorum of judicial proceedings must be preserved.

[14.] In looking carefully into the record, we cannot find what Morgan said to deceased in reply to the statement of deceased, that it was Jim Spence and Tom Thomas he was after, and not Charley Spence. We are unable to decide, therefore, whether it should have been admitted or not.

[15.] We think the Court should have allowed the witness, Gill, to state the facts or reasons which induced him to believe, that the Crosses were advancing upon the prisoner, when he shot. They might have demonstrated the correctness of his conclusion.

[16 and 17.] We hold the Court was right in permitting the witness, Lindsey, to be re-examined, notwithstanding he

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had remained in the Court-room subsequent to his first examination. And also, in allowing the diagram made by this witness, as to the relative position of the combatants, to be submitted to the jury. It was strictly rebutting proof.

[18.] We are quite clear that the Court erred in refusing to let the defendant bring in Wilkerson, Gill, Morgan, Verney, and McLin, to contradict Lindsey's testimony, by making out and exhibiting to the jury another diagram as to the respective attitudes of the parties in this affray. We know of no law which excludes surrebuting testimony, and such was the character of this. If counsel prefer to have their judgments affirmed, let them be cautious how they insist on the rejection of testimony.

[19.] The misconduct of the witness, Martin Williams, in telling Robert A. Rouse, another witness for the State, before Rouse was examined, what he, Williams, had sworn, might justly have subjected him to the punishment of the Court, but is no ground for a new trial. Besides, the Judge certifies that this irregularity was unknown to him.

[20.] The next complaint is, that "while the trial was progressing, and the jury were in the box, on Wednesday evening, while discharging the grand jury, and in the presence and hearing of the traverse jury, trying said cause, the Court stated amongst other things, that the criminal docket was very heavy and on the increase, and that it was attributable to their vigilance for bringing offenders before the Court, the only way in which crime can be suppressed."

There is nothing in this exception. The Court must discharge all its duties. Besides, what American Judge would hold the office, if he were not allowed to talk? To have his say? And some indulgence especially is to be granted to the habit of a Circuit rather praiseworthy noted for lecturing jurors, in order to stimulate them to a proper execution of the criminal law.

[21.] We see nothing in the charge of the Court which can be considered a qualification of the legal proposition

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asked for in the request. He merely gives the converse also, of the principle, provided the proof preponderates that way, asked for. Both are correct.

[22.] The next assignment is subject to the same comment.

[24 and 25.] We express no opinion as to the evidence, assuming that the prisoner will have the magnanimity of course, to return and submit himself to a new trial. *A privilege to which no outlaw should ever be entitled.* Did this case rest on this ground alone, we might not feel at liberty to withdraw it from the province of the jury. Although forewarned and dissuaded, he thrust himself into this quarrel. It is not pretended that his relative, old Charley Spence, was in very imminent peril.

[26.] There is nothing in this ground.

[27.] Nor the last. The Court violated no rule of evidence in the instructions given to the jury. And even taken in connection with the reproof administered to the witness, Wilkerson, we do not see that his Honor transcended his duty.

Judgment reversed.

McDONALD, J. absent.

JAMES GORHAM, plaintiff in error, vs. R. G. Hood, et al., defendants in error.

[1.] A person who was a constable, was sued in trespass, for tortiously taking some negroes. The constable justified under several *f. f. s.*. After the plaintiff had closed his evidence, the constable asked leave to amend his entries on the *f. f. s.*, by entering on them, a levy on the negroes.

Held, That the Court was right in granting him the leave asked for.

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[2.] A constable not being *authorized* to levy on negroes, when there is a sufficiency of other personal property to be found; if he does, in that case, levy on negroes, *trespass* will lie against him.

Trespass, *vi et armis*, from Harris county. Tried before Judge WORRILL, at October Term, 1858.

This was an action of trespass, *vi et armis*, by James A. Gorham against Rabun G. Hood and James M. Gordy, for entering plaintiff's close, and seizing and carrying away four negroes, of the aggregate value of about four thousand dollars, the property of plaintiff, and detaining said negroes for two days.

There was a second count for taking possession of plaintiff's corn crib, by locking the door thereof, and taking and carrying off the key.

The proof upon the trial, was, that defendants came to plaintiff's house in his absence, and took off four negroes; his children were at home and were taken to the house of a neighbor. Defendants had levied upon and taken off, a few days before, two mules, some cattle, and a rockaway carriage and wagon belonging to plaintiff. The mules were worth each, from one hundred to a hundred and fifty dollars; cattle worth about twenty dollars a head. This latter levy plaintiff replevied by forthcoming bond, and Hood was one of the sureties on the forthcoming bond. The *st. fas.* levied were eight in number, seven for thirty dollars each, and one for thirteen.

There was testimony as to some other matters, not deemed material to the understanding of the case.

After plaintiff closed, defendant Gordy, the constable, moved to enter upon the *st. fa.* a levy of the negroes seized. The Court allowed the entry of levy to be made; plaintiff objecting.

The jury found for the defendants, and plaintiff moved for a new trial:

1st. Because the Court erred in allowing Gordy, the bailiff,

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to make entry of a levy of the negroes on the *fi. fa.* after plaintiff had closed his case.

2d. Because the Court erred in charging the jury that plaintiff could not recover in this form of action, trespass, *vi et armis*, after the entry of the levy upon the *fi. fa.*, but must declare in case for an excessive levy.

3d. Because the verdict was contrary to law and evidence.

The Court refused the motion for a new trial, and plaintiff excepted.

RAMSAY & CARITHERS, for plaintiff in error.

D. P. HILL, represented by E. W. POW, *contra*.

By the Court.—BENNING, J. delivering the opinion.

[1.] The constable's entry was amendable. *Hopkins vs. Burch*, 3 Kelly 222. If it was amendable at all, we do not see why it was not amendable as well after the plaintiff had closed his case as before. We think that there is no validity in the first ground of the motion for a new trial.

Was the charge right? That depends on, whether *trespass* was the remedy.

If the constable, in levying on the negroes, acted *without* authority, *trespass* was the remedy; if he acted merely *in excess* of his authority, the remedy was *case*. It is agreed, I believe, that this is the somewhat nice distinction. Conceding, that such a distinction exists, the question is, whether the constable acted without authority? And, we think, that he did. At the time when he seized the negroes, he had already seized two mules, some cattle, a rockaway, and a wagon; and these articles were of sufficient value, to satisfy the *fi. fas.* The Act of 1811, (*Pr. Dig.* 506,) declares, that, "No constable shall be authorized to levy on any negro, or negroes, or real estate, unless there is no other personal estate to be found, sufficient to satisfy the debt."

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[2.] The constable, then, was not *authorized* to levy on these negroes.

That being so, trespass was the remedy.

This ground in the motion, we think, then, was valid, and therefore, we think, that there ought to be a new trial.

As to the remaining ground, it is one that need not be considered.

Judgment reversed.

**B. A. THORNTON, et. al., creditors, &c., plaintiff in error, vs.
N. J. BUSSEY & WILLIAM WOOLDRIDGE, administrators, &c.,
defendants in error.**

On the death of a member of two partnerships, both of which are insolvent and the estate of the deceased member is insolvent also, the creditors of each partnership must look to the effects of the partnership of which he is a creditor, for payment, and the separate creditors must look to the assets of the deceased partner for payment; in case of a surplus it is to be applied to the debts of the other class of creditors.

In Equity. Tried before Judge Kiddoo, Chattahoochee Superior Court, August Term, 1858.

A bill for injunction, and the marshalling of their intestate's assets, was filed by the defendants in error, as administrators of Thomas F. Wooldridge, deceased, against plaintiffs in error, as creditors of deceased, individually, and of the late mercantile firm of Wooldridge & Brannon, which said firm was composed of intestate and T. Brannon, and of the late firm of T. F. Wooldridge & Co., which was composed of intestate and one James; the estate of said intestate was insolvent, and both firms were insolvent; the assets of the firms were in the hands of the administrators of Wool-

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dridge, as well as those of the individual estate of Wooldridge, the intestate.

On the trial of the case, the Court charged the jury that "the creditors of T. F. Wooldridge & Co. should share *pro rata* the assets of that firm, each in proportion to their demands ; that the creditors of the firm of Wooldridge & Brannon should share *pro rata* the assets of that firm ; and the firm creditors, after deducting the *pro rata* share which each firm creditor had received from the respective firm assets, should then come in and share equally with the individual creditors of T. F. Wooldridge in all the individual assets ;" to which charge B. A. Thornton, one of the individual creditors, excepted and assigns the same as error.

THORNTON, for plaintiff in error.

NISBETS, *contra*.

By the Court.—McDONALD, J. delivering the opinion.

This is a bill by the administrators on the estate and effects of Thomas F. Wooldridge, deceased, asking directions of the Court as to the distribution thereof. The intestate was a member of two mercantile firms, both of which were insolvent; he had a considerable property in his individual right, disconnected from the partnership, but he was insolvent also ; the partnership creditors claimed to have appropriated to the payment of their debts, the assets of the firms respectively, of which they were the creditors, and for unpaid balances to share ratably with the individual creditors of the deceased, his own estate. The presiding Judge charged the jury in accordance with this position, and one of the individual creditors excepted.

This is the first time, I believe, that this question has been presented to this Court in a cause arising on the chancery side of its jurisdiction ; it has been before the law side of the Court twice, and the last was, by special agreement,

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made a *quasi* equity cause. I shall perhaps have occasion hereafter to refer to those cases.

The principle of the charge of the Court, to which exception is taken, is, that on the insolvency of a deceased partner, and two mercantile firms of which he was a member, the creditors of the firms respectively should divide among themselves, ratably, the assets, to the exclusion of the creditors of the individual deceased partners, and for unpaid balances they should share, ratably, with the individual creditors of such deceased partner. The rights of joint and separate creditors of mercantile and other partnerships, and of the individual members of such partnerships, have been much discussed, and variously determined. It has been held that the creditors of partnerships should come in, *pari passu*, with the individual creditors of an insolvent member of the partnership and share, ratably, his interest in the firm and his individual assets. Again, it has been decided, that the partnership effects should be applied to the payment of joint creditors, and the separate creditors should be entitled to the surplus only, if any; and if there should be a deficiency, that the partnership creditors for their unpaid balances, should share, *pro rata*, with the individual creditors, while in other cases it has been adjudged that joint creditors should look for payment, in the first instance, to the partnership assets, and that individual creditors should be entitled to pay from the individual assets, and that, for unpaid balances, each class of creditors should be entitled to any surplus of assets which may remain after the class of creditors primarily entitled to pay, had been satisfied. It is manifest that a Court of Chancery has no jurisdiction of any of these matters, unless the partnership, or the individual member of it, whose creditors are endeavoring to collect their debts, be insolvent. If all are solvent, there can be no ground for the interference of a Court of Equity. In that event every right is manageable in a Court of law; that jurisdiction can afford an adequate remedy in every

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case. A partnership creditor has his option, after judgment, to proceed with his execution against the partnership effects, or the individual property of any partner. If he proceeds against the former, there is an end of the case when he obtains satisfaction; if against the latter, the partner who is thus compelled to pay, has his ample remedy at law against the other partners for contribution. If it be the case that an execution against an individual member of a firm be levied on the partnership effects, the purchaser gets the interest in the concern which that partner had, which is the profits after paying the partnership debts.

The case before us is, indisputably, within the jurisdiction of a Court of Equity, and being so, it must be disposed of according to the principles of that Court which are most approved by our judgment. That the administrators of a deceased partner have brought the case before the Court for its direction in the administration of the assets of their intestate, does not change the rule by which the Court will be governed, in adjusting the rights of the parties, from that which would control it, if one or all of the creditors had been complainants; indeed, such bills are substantially the bills of the creditors, and the Court will so consider them. It is said that partnership contracts are joint and several, and that no equity in favor of a separate creditor can effect the rights of the contract of the partnership creditor; that the joint creditors can have execution against the separate, as well as the joint property, or take in execution the body of each member of the partnership, and that equity follows the law in such cases. There is some misapprehension in regard to what is meant when it is said that the contracts of partners are joint and several; such contracts are not joint and several at law; if they were, a separate action might be instituted at law against each partner, on the contract as his several contract; but that is not so. The partners must all be sued, and if one be omitted, it would be a good ground for a plea in abatement. That is the case in all joint con-

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tracts, whether there be a partnership or not. The Act of 1820, Cobb 485, authorizes the plaintiff to proceed to judgment against joint contractors or partners who may have been sued, although there are others sued in the same action, who cannot be found, and the judgment, when obtained, will bind the joint or partnership property, and the individual property of the defendants, who were served, and the execution issued thereon, may be levied on such joint and several property. But if the member of a partnership die, his personal representative cannot be sued at law, the contract being joint, but creditors are bound to proceed against the survivors. In equity, however, creditors may proceed at once against the executors or administrators of the deceased partners, and hence, those legal writers are more accurate who say that *in Equity*, the contracts of partners are several as well as joint. But the contract of a surety is often joint; but because that is the case, he is not precluded from setting up an equitable defence which may arise in the transactions between the principal debtor and creditor, which releases him from his contract. Again, that the separate property may be taken in execution does not determine the character of the contract. It is often the case, that when contracts are joint there is no joint property, and the creditor must necessarily obtain satisfaction from the individual property of the joint contractors; that the joint creditor may proceed with his execution against the partnership property or the individual property of the partners, does not preclude the joint, or separate creditor of a partner from asserting an equity which entitles him to an exclusive satisfaction from the partnership or individual assets, accordingly as he may be a partnership or individual creditor.

Is there such an equity in favor of the different classes of creditors presented before us in this record? As already remarked, the parties all are insolvent, and neither the partnership creditors, nor the individual creditors of complainant's intestate, can be paid in full. The most just and

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satisfactory rule in such a case, is that which was adopted in cases of bankruptcy in England, long anterior to the revolution, and which was the prevailing law at the time of our adopting statute, viz: that the partnership, or joint assets should be first applied to the payment of the partnership debts, and the surplus, if any, to the payment of the separate debts; and that the separate effects be applied first to the payment of the separate debts, and the surplus to payment of the partnership debts. *Ex parte Crowder, 2d Vernon,* 706; *Ex parte Cook, 2 Peere Wm's,* 500. This rule is commended by its equity and good sense. The justice of it was the cause of its adoption. The Court of chancery in England regulates these equities there, and controls the assignees in the distribution of the effects of bankrupts according to the equity of the case, when it does not come in conflict with any settled rule of law. Lord King, in a case before him, said, that the rule, as stated by us, was settled, and that it was a resolution of convenience. He did not say that it was so settled, because of its convenience; being a rule founded in the equitable rights of the parties in every such case, it was adopted; I have no doubt that the assignees might proceed to distribute the effects under it, without compelling creditors to resort to a Court of Chancery in every case, for special directions.

There is much equity in the rule, and as applicable to cases in which there has been no fraud, it is unexceptionable. It must be presumed, that every partnership debt increases the partnership effects to the same amount, and it is but just that they should be applied to their payment in preference to debts which contributed nothing to them, provided one or the other must go unpaid; and the same may be said in regard to the individual debts and effects of a partner.

Circumstances may exist in some cases which might call for a strict scrutiny into the conduct of the partners, to ascertain whether a part of what appears to be joint effects, are

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not in fact the separate property of one of the partners, so as to give an equity to an individual partner, and *vice versa*; but that does not affect the rule; it only shows that there may be cases in which to give effect to the rule, there should be a strict investigation of the conduct and rights of the parties.

In the case of *ex parte Hayden*, 1 *Brown* 454, joint creditors were allowed to prove on a separate commission, and to receive a dividend *pari passu* with separate creditors. There was no joint estate in that case, and the report is very short. The joint estate may have been divided out among the partners, and in that event, it would be one of the cases in which it would be proper to give effect to the rule, that the relative value of the joint estate, and the individual effects, as well as the amount of the joint and individual debts, should be ascertained. The case of *ex parte Cobham*, *Ib.* 576, was consented to.

The rule above laid down by us, prevails now in England, whether a joint debt be proved under a separate commission, or whether a separate debt be proved under a joint commission.

The case of Cleghorn vs. the Insurance Bank of Columbus, already referred to, was mainly decided on the ground that the parties were not in a Court of Equity, and the case being in a Court of law, the superior legal lien should prevail. The case in 19th *Geo. Rep.*, was decided on the ground that the above case was a precedent for it, although by agreement it was to be considered as though a bill in equity had been filed to adjust the rights of the parties. There is no question of lien in this case, but there can be no question, I apprehend, that if, in the two classes of creditors, some have liens, and others have not, the liens must have the precedence of debts having no lien, in the distribution of that portion of the effects from which the debt was to be paid; but a judgment against the partnership cannot, on the

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ground of lien, be satisfied from the private assets, when that class of debts cannot share at all those assets with the separate creditors.

Judgment reversed.

BENJAMIN F. LENNARD, bearer, plaintiff in error, vs. JOHN H. JONES, trustee, defendant in error.

When it is sought to charge the husband, as trustee, and the proof shows he never accepted the trust, it is not competent for the plaintiff to strike out the name of the husband, and substitute that of the wife as *cestui que trust*.

Assumpsit, from Randolph county. Decision by Judge KIDDOW, at the June adjourned Term, 1858.

Benjamin F. Lennard, bearer, brought suit against John H. Jones, trustee of Mary A. Jones, to recover the sum of ninety-five dollars and twenty-three cents, (\$95 23) besides interest, the amount of a promissory note given by said Mary A. Jones, to James D. Lennard, dated 7 July, 1856, payable one day after date, and afterwards for valuable consideration transferred to plaintiff.

The declaration alleged that said Mary A. Jones, and her children, were the *cestui que trusts* of two negro slaves, conveyed to them by deed, from Jemima W. Poole, and that said slaves were in the possession of John H. Jones, as trustee; that said note was given for goods, wares, and merchandise, sold and delivered to said Mary A. Jones, for the use and benefit of herself and children, and said estate, and that said estate was liable for the same.

The action is brought against the trustee under the provisions of the *Act of 5th March, 1856, p. 22^s*.

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The defendant pleaded that when said note was given, said Mary A. Jones was a married woman, the wife of defendant.

After reading in evidence the note sued on, plaintiff introduced a book, containing the original entries of part of the goods sold and delivered, and for which the note was given; said entries amounting to \$64 31. Plaintiff then proposed to prove the loss or destruction of another book, containing the original entries of the balance of the goods sold, and making up the amount for which the note was given. Defendant objected to the testimony as inadmissible, the objection was sustained by the Court, and plaintiff excepted.

Plaintiff then moved to amend the declaration, by striking out the name of John H. Jones, and inserting that of Mary A. Jones, the *cestui que trust*, as defendant; which motion the Court refused, and plaintiff excepted.

Defendant moved for a *nonsuit*, which the Court granted, on the grounds, that plaintiff had failed to make out his case—had failed to show how the trust estate was subject to the payment of the note sued on; and that the *corpus* of a trust estate could only be subject to sale when necessary for the benefit of the estate. To which decision plaintiff excepted.

GEO. L. BARRY, for plaintiff in error.

HOOD & ROBINSON, *contra*.

By the Court.—LUMPKIN, J. delivering the opinion.

This was a suit to recover at law, a debt out of a trust estate. The action was brought against the husband, as trustee; it turning out on the trial, that he had never accepted the trust, the Court granted a *nonsuit*, refusing to permit the plaintiff to substitute the name of the wife, who

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was one of the *cestui que trusts*, in the place of that of the husband.

There can be no doubt that the Court was right, and notwithstanding the Act of 1856, gives the right to sue at law, still it never was designed to confer such power as that here claimed.

We see nothing wrong in the other rulings complained of. In the view already taken of the case, it becomes unnecessary to notice them more particularly.

Before commencing any proceedings, either at law or in equity, counsel would do well to examine and see whether the *children* should not be parties likewise; provided there be children. Also, how far the giving of the note, in this case, will indicate the intention of the wife to bind her separate property for this debt. This question has been much discussed, and there is no little law learning in the books, upon that point.

Judgment affirmed.

McDONALD J. absent.

HENRY H. HORTON, et al., plaintiffs in error, vs. LEWIS F. HICKS, Sheriff, for the use of another, defendant in error.

H. was arrested under a *ca. sa.*, at the instance of B. He gave bond to take the benefit of the insolvent debtors Act. He was again arrested at the instance of W., and gave bond to keep the prison limits. The securities in the *ca. sa.* bond surrendered H. to the Sheriff, and he gave another prison limits bond. Upon the expiration of the six calendar months, under the first prison limits bond to W., the Sheriff put H. in jail, the other prison limits bond having still six days to run. H. escaped from jail.

Held, That the securities on the second bond were not liable.

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Debt, from Crawford county. Tried before Judge LAMAR,
September Term, 1858.

This was an action of debt on a prison bounds bond brought by Lewis F. Hicks, sheriff, for the use of Elijah Bond, against Henry H. Horton, principal in the bond, and W. W. Matthews and others, sureties.

The case was submitted upon the following agreed statement of facts:

That Henry H. Horton was arrested by virtue of a *ca. sa.*, at the suit of Elijah Bond, on the 24th March, 1856, and entered into bond with security, for his appearance to take the benefit of the honest debtor's Act, at July Term, 1856, of the Inferior Court of the county of Crawford. That on the 9th June, 1856, the sureties surrendered Horton to the Sheriff, when he gave bond for the prison limits. That before this surrender, on the 31st May, 1856, Horton was arrested by virtue of a *ca. sa.*, at the suit of E. F. Wood & Co., and gave bond for the prison limits; that he remained within the prison bounds until the 1st December, 1856, when he was taken by the Sheriff, and closely confined in the jail of said county; the six months having expired since his arrest, and giving bond for said limits, under the *ca. sa.* of Wood & Co. That Horton remained in jail until the 3d December, 1856, when he broke jail, and escaped, and fled beyond the jail limits, and beyond the limits of the county. B. A. Horton was surety for H. H. Horton, upon both the prison bounds bonds, and the *ca. sa.* bond. That H. H. Horton at the time he escaped, was not confined in the jail at the suit of Bond, and he was not surrendered by any of his sureties on the prison bounds bond, given in the case of Bond. That he made his escape six days before the expiration of six months from the date of the bond sued on. That he never took the benefit of the honest debtor's Act, in the case on which Bond had him arrested, and never paid

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Bond's debt, and that his escape was not by the knowledge or consent of Bond or any of his attorneys.

Upon this statement of facts, the sureties moved for a nonsuit, on the ground, that their principal, H. H. Horton, was taken from their custody and control by the Sheriff, and confined in jail, and they were thereby discharged from their liability on said bond.

The Court overruled the motion, and the jury under the direction of the Court signed a verdict for the plaintiff, and defendants excepted.

SAM. HALL; G. P. CULVERHOUSE; GRICE & WALLACE, for plaintiffs in error.

COOK & MONTFORT; and HUNTER, *contra*,

By the Court.—LUMPKIN, J. delivering the opinion.

Are the securities on the unexpired bond liable for the escape of Horton from jail?

The statute says to the debtor, give security that you will not go beyond the ten acres, and you shall not be confined within the four walls. He accepts the privilege and executes the requisite bond. He is seized by authority of law from another quarter and shut up in jail. Ought his bondsmen to be further responsible for his safe keeping?

The liberty of the debtor is the consideration for the bond, which fails as soon as he is committed to close confinement. To hold the bail liable after this, would be unreasonable. Deprive the debtor of the partial liberty secured to him in consequence of giving the bond, and the only object in giving it is defeated; while the prisoner had volition, he did comply with his undertaking. By the act of incarceration his status was changed, and was then an act between the Sheriff and himself, and no body else. . And shall the Sheriff make his own neglect a cause of action against the securities?

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Is there a case known to the law, where securities are liable for the safe keeping of a prisoner, civil or criminal, who is legally confined within the four walls of the jail? We apprehend not.

Judgment reversed.

JAMES HARDIN, plaintiff in error, vs. GEORGE BROWN, defendant in error.

- [1.] An award of arbitrators at common law, may be attacked and set aside for fraud, and the parties against whom it is rendered, need not resort to a Court of Equity for that purpose.
- [2.] Under the Act of 1856, an award can only be impeached for fraud in the arbitrators. But at common law, an award may not only be vacated for corruption or partiality in the arbitrators, but for a mistake into which they have been led by undue means, or into which they have been permitted to fall, by the fraudulent concealment of the party or his agent.
- [3.] Courts, while they may not correct the award, or revise the decision of the arbitrators, hold it to be against conscience to take advantage of an award to enforce it, or to use it as a plea to bar a defence.

Complaint, from Bibb Superior Court. Tried before Judge LAMAR, at November Term, 1858.

Suit was brought by James Hardin against George Brown, on a note made by Brown, for the sum of eight hundred dollars, of which the following is a copy:

“ \$800 00. On or before the 25th day of December next, I promise to pay James Hardin or bearer, eight hundred dollars, for value received, with interest from date. This 22d August, 1856.

Signed)

GEORGE BROWN.”

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On the trial of the case in the Court below, plaintiff read in evidence the foregoing note, and rested his case.

In the further progress of the trial, a number of witnesses were examined, and depositions read, disclosing the following state of facts:

On the fourteenth day of April, in the year 1856, George Brown sold to James Hardin a negro woman named Eliza, and her child about one year old, for the sum of eleven hundred dollars. Brown made to Hardin a bill of sale in the usual form with warranty. On the 22d day of August, next succeeding, Hardin came to the house of Brown, in company with his overseer, Alfred Dennis, the brother-in-law of Brown, and told Brown he must take the negroes back. Brown asked him why he wished them taken back; and Hardin answered, "because when I bought her, I thought she was in the family way, but she was not." Brown said, if she was not, he would take her back. It was ten miles from Brown's house to Hardin's plantation, where Eliza was; she was not produced on this occasion, and it did not appear that Brown had seen her after the sale in April. Brown asked Hardin what was the condition of the woman at that time; Hardin replied that he had not seen her since the physician had been attending on her, and called on Dennis to state what the physician had said to him. Dennis then said to Brown, that the physician said she was very low, and if she had another fit she would die; and further, that he would not give his old hat for her chance of life. Brown asked Hardin if he considered the woman worth as much then as she was when the sale was made in April; Hardin said he did. It was then agreed that the trade should be cancelled; and that the negroes should be brought back by Hardin, whenever Brown should decide that she was able to travel. In lieu of returning the purchase money, Brown gave Hardin notes on one Calloway and Dr. Purifoy, amounting to three hundred dollars, and his own note, the subject of this suit, for eight hundred dollars.

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When Brown went to Hardin's, the next day, the woman was dead and buried; she died about twelve hours after the trade was cancelled.

The parties afterwards submitted the whole matter to seven arbitrators, and each took oath to abide the award. The submission was not in writing. The award of the arbitrators was, that Hardin should keep the notes, and Brown should take back the child and bill of sale.

At the arbitration, *Dr. Simmons* swore, (as he also did at the trial in the Court below,) that on the night before the arbitration, 17 or 18 days after Eliza's death, he, in company with P. T. Wilson, Alfred Dennis and a medical student, exhumed the body and made an examination of the womb. The disinterment was made about the 11th day of September; the womb was not in a state of putrefaction, and was of the natural size; the body was not very offensive; the examination consumed about five minutes. Is of the opinion that there had been no *fætus* in the womb from 30 to 60 days before the woman's death; never had seen the woman before she died; Dennis identified the body; never saw any thing after said examination to change his opinion; Hardin procured him to examine the body.

When this testimony was given in at the arbitration, Brown complained that he had received no notice that the body was to be disinterred. Brown admitted that if the woman was not pregnant, she was unsound when he sold her. Hardin also stated to certain persons at the arbitration, that it was useless for Brown to prove that the negro was sound, when the original sale took place, because he admitted she was at that time sound.

Dr. Searey swore at the arbitration, and on the trial, that a few days before Brown sold the woman to Hardin, he saw Eliza; she complained of *nausea* in the mornings, and of giddiness. Dr. S. thought she was in the early stages of pregnancy, and directed her to be bled freely.

After the arbitration, the child and Eliza's clothes and bed-

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ding were sent back to Brown's; the clothes of Eliza were stained with blood, and some of them were mutilated; the mattress was also stained, and the blood had run completely through it, all having the appearance of having been used by a woman who had flooded considerably. The clothes and bedding were not exhibited at the arbitration. The arbitrators testified, that the main question to which they directed their inquiries was the one as to the pregnancy of the woman, and that their decision was based on the testimony of Dr. Simmons, and the admission by Brown, that if the woman was not pregnant, she was unsound at the first sale. The clothes and bedding of Eliza were afterwards exhibited to five of them, and three of the five swore, that after seeing the bloody clothes and bedding, they were dissatisfied with their finding, and that if they had seen these things before the arbitration, their finding would have been different.

Dr. Searcy, Dr. Fitzgerald and Dr. Hammond swore, that they did not think such information could be obtained from an examination of the womb of a woman who had been dead seventeen or eighteen days, in the month of August, in this climate, as to enable medical men to determine whether or not there had been a *sætus* in the womb from 30 to 60 days before death.

Other testimony was offered, but the foregoing statement discloses the material facts proved on the trial.

The jury found a verdict for the defendant, and plaintiff moved for a new trial on the following grounds:

1st. Because the Court erred in admitting testimony to impeach the award of the arbitrators.

2d. Because the Court erred in admitting testimony going to prove the soundness of Eliza at the time of the sale by Brown to Hardin, and also to prove that the bedding and dress were bloody.

3d. Because the Court erred in charging the jury, that if the defendant had proven fraud on the part of the plaintiff, in procuring the award, he had a right to do so in this ac-

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tion, and they must find for defendant if they should further believe that the note was procured by fraud, and that the consideration had failed.

4th. Because the Court erred in ruling, that the defendant had the right to plead the notes of Calloway as a set-off.

5th. Because the jury found contrary to law.

6th. Because the jury found contrary to evidence.

7th. Because the Court erred in admitting testimony to prove what Dr. Simmons testified before the arbitrators, and in refusing to rule it out on motion of plaintiff's counsel.

8th. Because the Court refused the motion of plaintiff, to rule out all evidence introduced by defendant, that did not show fraud in the arbitrators. Which motion the Court overruled, and plaintiff excepted.

POE & GRIER, for plaintiff in error.

SPEER & HUNTER, *contra*.

By the Court.—Lumpkin J. delivering the opinion.

This case is somewhat tangled up by the direction it has taken. It will be found, however, to turn mainly upon the validity of the award rendered between the parties.

Hardin bought of Brown a negro woman and child for \$1,100. He paid \$800 cash, and gave the notes of Jonah D. Calloway and Dr. A. W. Purifoy, which he held, for the balance of the purchase money. Brown warranted the slaves to be sound in body and mind. Hardin kept the negroes four months, and being dissatisfied with the trade, went to Brown to rescind the contract. After parleying with one another, Hardin asserting that the negro woman was worth as much as when he bought her, Brown agreed to the rescission. Not having the cash to refund, he gave his note to Hardin for \$800, and re-delivered to him Calloway and Purifoy's notes, at the same time taking back his bill of sale. The woman, whom Brown had not seen since he parted with her, died the

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same night, and within twelve hours after this second contract, which took place at Brown's house, some ten miles off from Hardin's plantation, where the negro was. Brown refused to pay his note, alleging that he had been defrauded by Hardin.

They then consented to submit their matters to seven arbitrators, who met, and after hearing the testimony, awarded that Hardin should retain the notes, and Brown take back the negro child. In other words, that the arrangement between the parties should stand. The child was sent home to Brown, and he still has it.

[1.] Hardin sued on the \$800 note, and Brown pleaded failure of consideration, and fraud in the procurement of the note. Hardin replied, in effect, the award as a bar to this defence. Brown rejoined, that the award was fraudulently obtained and void. Hardin, by his counsel, objects to the award being attacked in a Court of Law. But we hold, that the judgment of a Court in this State, may be vacated for fraud, *at law*, and of course an award of arbitrators may be.

[2.] Again, Hardin insists, that an award can only be attacked for fraud in the arbitrators. And this is true, under the Act of 1856. But this is an award at common law, and not a submission under that Act. Corruption or partiality are grounds for setting aside an award at common law. And so is a mistake, into which the arbitrators have been led by undue means, or into which they have been permitted to fall by the *fraudulent concealment* of the party or his agent *Metcalf vs. Ives*, 1 Atk. 63; *Russell on the Power and Duties of Arbitrators*, 53, 1 Lib. new series, 636. A Court, in such cases, does not correct an award, or revise the decision of the arbitrators; but holds it to be against conscience to take advantage of the award, by seeking to enforce it, or by using it as a plea to bar a defence.

The complaint against the award in this case is this: When Brown sold the woman Eliza to Hardin, he supposed she was pregnant, although he did not warrant it. When

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told of her situation by Dennis, the overseer of Hardin, he admitted that if she was not pregnant, she was diseased. The fact of her pregnancy, then, became to be very material in the altercations between the parties. She had been dead and buried eighteen days when the arbitration took place. The night before the arbitration, Hardin procured Dr. Simmons, who was not his family physician, and who had not attended the woman, to disinter her remains, and make a *post mortem* examination. This was done at 9 o'clock the over-night, by torch light, and within five minutes time! Dr. Simmons testified before the arbitrators the next day not only that there was no *fætus* in the womb, but that none could have been there from thirty to sixty days before her death! And this proof sprung upon Brown without notice, and given in just at the heel of the investigation, in all probability controlled the case. While Brown was attempting to prove that the woman was sound when he sold her, Hardin stated emphatically, that he did not dispute it, remarking that he had Brown by the leg, any how. But this was not all. Subsequently to the award, the child was sent to Brown's, and with it, the clothes and bedding of the woman, the whole stained with blood, and the mattress on which she lay saturated so as to be wet through, and her apparel partially mutilated, and some of it removed. And these facts coming to the knowledge of Brown, determined him to resist the payment of the note, and the execution of the award. Three of the arbitrators swear, that if they had seen these clothes, furnishing such strong presumptive evidence that the woman had given birth to a child, living or dead, they would not have rendered the award which they did. The weight of medical authority is altogether against the opinion of Dr. Simmons. Physicians who bear testimony to his skill and integrity, express it as their decided belief, that Dr. Simmons could have come to no satisfactory conclusion under the circumstances which attended his examination.

Well, with all this proof before them, the Court instructed

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the jury, that if the defendant had shown fraud on the part of the plaintiff, in procuring this award, which he had a right to do, they should find for the defendant, if they should further believe that the note was originally procured by fraud, and the consideration had failed.

The charge is fair, and there is abundant proof in the record to support the verdict.

We sustain the Court upon all the exceptions taken to the admissibility of evidence during the trial, and in refusing to withdraw any portion after it was admitted. And affirm generally the judgment of the Court below.

Judgment affirmed.

GABRIEL CLIFTON, and others, plaintiffs in error, vs. ROBERT ²⁷
O. HOLTON, administrator, *de bonis non*, &c., defendant in ³²¹
¹¹⁶ ²⁶¹ error.

S. H. executed his will and died. By the 3d item, he bequeathed to J. F. H., his only child, certain property; and by the 6th item, he directs as follows: "In case my son S. dies before he arrives at twenty-one years of age, and without issue, all the property given herein before to my said son, I give and devise to my blood relations, of nearest kin, to be equally divided among them. J. F. H. died under twenty-one years of age, and without issue. At the time of the execution of the will and death of the testator, M. H., a widow, was the only surviving brother or sister of the testator. She had children. There were two families of nephews and nieces, the children of deceased sisters. The parents of testator were both dead. All of the foregoing facts, it was agreed, were well known to the testator at the time he made his will. After the death of testator and while his son was still in life, the only surviving sister died.

Held, That the children of M. H. were not entitled to the whole of the contingent legacy, but that the families of the other two sisters were entitled to participate.

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In Equity, in Houston Superior Court. Decision on demurrer, by Judge LAMAR, at November Term, 1858.

Gabriel Clifton, and others, children of Nancy Clifton, deceased, filed this their bill against Robert O. Holton, administrator, *de bonis non*, with the will annexed, of Samuel Holton, deceased, for their share of a legacy, claimed by them as remaindermen, under the will of said Samuel.

The bill states that testator duly made and executed his last will and testament, the *first of June, eighteen hundred and forty-six*, and died in August thereafter, leaving said will in full force and unrevoked.

That the third item of said will, is as follows:

“*Item Third: I give and devise to my son James Fitzgerald Holton, Mat a negro man; Amy, a negro woman and her natural increase; also, her children, namely: Bob, a boy, and Wiley, a boy, Harriet, a girl, Dave, a boy, and Sarah, a girl. I also give and devise to my said son, two tracts or lots of land,*” (describing them,) *that in and by the sixth item of said will testator bequeathed, as follows: “In case my son James die before he arrives at twenty-one years of age, and without issue, all the property herein before given to my said son James, I give and devise to my blood relations of nearest kin, to be equally divided among them.”*

The bill states that testator died leaving but one child, the said James Fitzgerald, and that when said will was executed, and at the time of his death, the only and nearest blood relations he had, exclusive of his said son, were a sister, Mrs. Margaret Holton, and the nephews and nieces of two pre-deceased sisters, Mrs. Taylor and Mrs. Nancy Clifton. That there were, and are now, four children of Mrs. Taylor, and complainants, seven in number, are the children of Nancy Clifton. That Margaret Holton, the last surviving sister of testator, died in 1851, leaving six children. That James Fitzgerald Holton died in 1855, before arriving at the age of twenty-one years, and without issue. That after his

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death, the defendant, Robert O. Holton, a son of said Margaret, took out letters of administration *de bonis non*, with the will annexed, on the estate of Samuel Holton, and possessed himself of all the property, real and personal, bequeathed to said James, as aforesaid.

The bill states that complainants are entitled, as "*blood relations of nearest kin*" to testator, to an equal share of said legacy with the children of Margaret Holton and Jane Taylor, to be divided amongst all *per capita*.

To this bill the defendant demurred for want of equity, in this, that complainants were not entitled to any part of said legacy, but upon the death of James Fitzgerald Holton, the same vested solely and absolutely in children of Margaret Holton, the sister of testator, the nearest blood relation at the time the will was executed, and at the period of testator's death.

After argument, the Court sustained the demurrer, and dismissed the bill, and counsel for complainants excepted.

SAMUEL D. KILLEEN, for plaintiff in error.

JNO. M. GILES, *contra*.

By the Court.—LUMPKIN, J. delivering the opinion.

The question in this case is not without embarrassment. Several propositions insisted on by the counsel for the Holtons, may be connected for the purposes of this decision. It may be granted that "the blood relations of nearest kin," to the testator, are to be ascertained and fixed at the time of his death, and not the death of his *son*; a rather debateable point. The words of the will are, "*in case*, my son dies," I then give over this property "to my blood relations," &c. The division contemplated, is evidently at the death of the son, and why not the gift over to those who answer to the description of nearest blood relations at that time?

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Yield, also, that "*relations*" may be read in the singular, although there is no reason for making the substitution in this case; nay, concede that if the item of the will had stopped at the first clause, "my blood relations of nearest kin," that the sister would have taken—and this we apprehend is all and more, perhaps, than can be fairly claimed: still we think the case is with the complainants.

We must give effect to all the words in the will. And in this, as in thousands of cases, the context or explanatory words must control the technical terms of the testament. Dying without issue, which taken by themselves would create a perpetuity, are often enlarged by superadded words, so as to constitute a good remainder over.

It is agreed on the record, that the testator knew that he had an only sister living, and no brother; that his parents were dead, so that there could not possibly be another brother or sister. Could he have intended to restrict his bounty to that only sister, and yet give the property to his blood *relations* of nearest kin, and direct it "to be *equally* divided among them?" must he not of necessity have contemplated and intended to have provided for more legatees than *one*? He not only employs the plural, *relations*, but he directs an *equal division* to be made. A gift to one, is utterly inconsistent with the idea of a *division*, much less an *equal division*, when that one takes the whole, and that is not all, it is to be an equal division among "*them*," that is, the blood relations already mentioned.

Policy favors the subdivision of property. Courts should, in this country, lean to that interpretation of wills, which carries out the provisions of the statute of distributions, rather than to that which defeats them. For this statute after all, is our American Magna Charta; doing more to perpetuate our republican institutions than the Constitution. For without the accumulation by law of property, in the hands of the few, there can be no privileged classes.

Justice and equity favor this construction, why should not

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all who stand in the same degree of relationship to the testator, at the time this estate took effect, share alike in his bounty? Why should one family of nephews and nieces, the children of a deceased sister get all, while two other families of nephews and nieces, the children also of deceased sisters, get nothing? It is not in such cases that Courts convert the plural into the singular number—but to prevent a failure of testamentary disposition.

The testator had but one object in view, to exclude his wife and her kin from any further participation in his property. He provided handsomely for her, and gave a small legacy to a daughter, probably by a previous marriage. He did not intend *them* to come in again. Hence the employment of the terms, “blood relations.” It was not so much to designate which of his blood kin should take, as to shut out those who should not. This is the key to the will.

Judgment reversed.

JOEL F. RUSHIN, and others, plaintiffs in error, vs. CICERO H. YOUNG, et al., defendants in error.

John Rushin died, leaving a will with three executors, Shad. R. Felton, Jno. C. Rodgers, and Wm. Rushin. Felton took possession of the estate, and proceeded to execute the will, but before executing it fully, himself died, leaving a will and two executors. Shortly afterwards, Rodgers also died, and Wm. Rushin moved into Alabama. John Rushin left no debts. Some of the legatees under the will of Jno. Rushin, sued the executors of Felton in equity, for their legacies.

Held, That the suit lay.

In Equity, from Macon county. Decision on demurrer, by Judge LAMAR, at September Term, 1858.

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This was a bill filed by Joel F. Rushin, (child and heir at law of Joel Rushin, deceased,) John Rushin and William Rushin, (children and heirs at law of John Rushin, junior, deceased,) and Stephen Bivins, and his wife, Celia Bivins, against John C. Rodgers, one of the executors of John Rushin, deceased, and Cicero H. Young and John M. Felton, executors of Shadrick R. Felton, deceased.

The bill states that John Rushin, of the county of Macon, departed this life testate on the 25th February, 1843, leaving in full force his last will and testament, which is made an exhibit and part of the bill. That William Rushin, senior, then of Macon county, but now of the State of Alabama, Shadrick R. Felton, then of Macon county, but now deceased, and John C. Rodgers, now of the county of Macon, were appointed, and duly qualified as executors of said will. That the said Shadrick R. Felton, one of the executors aforesaid, departed this life in 1852, leaving his last will and testament, and appointing Cicero H. Young and John M. Felton, his executors, who duly qualified and took upon themselves the execution of said will. That upon the probate of the will of said John Rushin, in March, 1843, all the executors therein named, having qualified, took possession of the entire estate of their testator, consisting of lands, negroes, horses, mules, cattle, hogs, corn, fodder, cotton, household and kitchen furniture, &c. &c. judgments, executions, notes and cash on hand, and all amounting to a very large amount in value, to-wit: over the sum of one hundred thousand dollars.

The bill charges that there was due to said estate a large amount, and number of debts which were not returned and specified in the inventory of said estate, made and returned by said executors. The bill also states, that the testator at the time of his death owed nothing. The bill states further, that complainants by said will of John Rushin, deceased, were bequeathed certain negroes specifically, and with seven others, were the residuary legatees in and under said will, and that said executors, have failed and re-

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fused to account and settle with complainants for their legacies, and have misappropriated and wasted said estate, and are using the same for their own benefit; having sold the lands, negroes, &c. belonging to said estate.

The bill further states, that William Rushin one of said executors, after his qualification, removed from the State and is not made a party. That said estate, even while said William Rushin resided in this State, was principally managed by Felton and Rodgers, his co-executors, and that said William received but a small portion of said estate into his hands.

The bill prays for a discovery and account, and that defendants pay to complainants the amount that may be found due and coming to them, &c.

After the filing of the bill, John C. Rodgers, one of the executors and defendants, departed this life, intestate, leaving William Rushin of Alabama, the sole surviving executor.

The bill was amended, alleging that the said Rodgers, and Shadrick R. Felton, when in life, as the executors of John Rushin, deceased, took possession of the *whole* estate of said deceased, their testator, and that said Shadrick was in possession of a great portion thereof, at the time of his death, and that Cicero H. Young and John M. Felton, took possession of said effects and property in the hands of their testator, the said Shadrick, and that complainants are unable to specify and identify said property, and are compelled to resort to the consciences of defendants for a discovery of the same.

To this bill, defendants, Young and John M. Felton, executors of Shadrick R. Felton, deceased, one of the executors of John Rushin, deceased, demurred on the following grounds, to-wit :

1st. Because there was no equity in said bill.

2d. Because, it appears by said bill that William Rushin, senior, John C. Rodgers and Shadrick R. Felton, were appointed, and all qualified as executors of said John Rushin,

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deceased, and that said Shadrick R. Felton, departed this life, leaving said William Rushin, senior, and John C. Rodgers surviving him in office as executors, and that said Shadrick R. Felton having died, leaving defendants his executors, who by said will are charged and treated as representatives of John Rushin, deceased, with William Rushin, senior, and John C. Rodgers, the original and surviving executors of said John Rushin, deceased.

The Court sustained the demurrer and dismissed the bill as to defendants demurring.

To which decision complainants excepted.

BLANDFORD & CRAWFORD ; B. HILL ; FISH & ROBINSON,
for plaintiffs in error.

SAM'L HALL, *contra.*

By the Court.—BENNING J. delivering the opinion.

Was the Court below right in sustaining the demurrer to the bill?

The demurrer was filed by Young and Felton, the executors of Shadrick R. Felton, deceased.

The complainants are legatees under the will of John Rushin, deceased, and they sue for their legacies given in that will. That will appointed Shad. R. Felton, Jno. C. Rodgers and Wm. Rushin, its executors. Rodgers is now dead; Wm. Rushin is a citizen of Alabama; Felton is dead too. Felton was the principal executor, and into his hands, went the whole, or almost the whole of the testator, Jno. Rushin's estate. Jno. Rushin left no debts. Consequently, we may assume, that the legacies to the complainants, have completely vested in them.

The question, then, is, are Shad. R. Felton's executors accountable for these legacies directly to the legatees, or only to

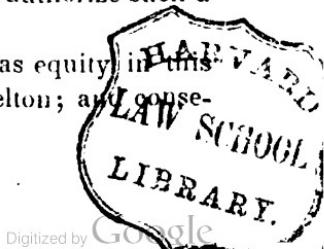
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some person representing John Rushin's estate, as his executor, or as his administrator *de bonis non?* And, for ought that we can see, they may be required to account directly to those legatees. A payment to the legatees will be a protection to them, against any suit for the same legacies, brought by any representative, of John R. Rushin's estate; because all the use such a representative could have for the legacies, if recovered by him, would be to apply them to debts, or, to turn them over to the legatees, their owners. But there would be no debts, and the legacies would already have been turned over to their owners, by the executors. Such representative, therefore, would not be allowed to call the executors to account for the legacies. So far then, as the executors themselves, are concerned, there seems to be no reason, why they should not be required to account directly to the legatees.

So far as the legatees are concerned—it is greatly to their interest, that the executors should be required so to account. Even if there were an accessible representative of John Rushin's estate, to make these executors pay the legacies over to him, that he might pay them over to the legatees, would be a round-about way of accomplishing the object—a way involving, double the time, double the labor, double the cost, and double the risk, of the direct way. But there is no accessible representative of that estate. Wm. Rushin, one of the three executors, resides in Alabama; Shad. R. Felton and Jno. C. Rodgers, the other two, are both dead. And it may, indeed be a question, how an accessible representative is to be obtained in such case.

Moreover, where there are two parties who are liable to a debt or duty the one immediately, and the other mediately—and the former resides out of the jurisdiction, the latter may be sued in the first instance, in equity. The non-residence of the former, constitutes a special equity to authorize such a suit against the latter.

Upon the whole, we think, that there was equity in this bill, as against the executors of Shad. R. Felton; and conse-



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quently, that the Court below erred in sustaining the demur-
rer.

Judgment reversed.

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**JOHN P. IRVING, guardian, plaintiff in error, vs. ELBERT MEL-
TON, administrator, defendant in error.**

A suit in equity against a person who was an administrator, was a suit to which, he might plead as administrator; a suit in which, the decree might be against him as administrator; a suit the title set up, in which, was good against him only as administrator; a suit the prayer in which, was against him as administrator.

Held, That it was a suit against him as administrator, and therefore, that he had the right to appeal without giving security.

In Equity, from Randolph county. Decision by Judge KIDDoo, November Term, 1858.

This was a bill in equity, by John P. Irving, guardian of the infant children and distributees of McKinny Melton, deceased, against Elbert Melton, administrator of the estate of said deceased, for an account and settlement.

The prayer of the bill was, "that the Court order and decree, that an account may be taken by, and under the direction of the Court, and what is due and coming to the wards of your orator from him, the said Elbert Melton, as administrator of said McKinny Melton, so deceased as aforesaid, that said Elbert may be decreed to pay over to your orator as guardian as aforesaid."

The jury found "for the complainant five thousand nine hundred and seventy-eight dollars, and ninety four cents, with interest from 1st January, last."

From this verdict the defendant appealed, and upon the

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cause being called for trial on the appeal, plaintiff moved to dismiss the same, upon the ground, that defendant had not given the bond and security required by law, in cases of appeal. He having given no security at all.

The Court refused the motion, holding, that defendant, being an administrator, was not required by law to give security. To which decision counsel for plaintiff excepted.

DOUGLASS & DOUGLASS; BLANDFORD & CRAWFORD, for plaintiff in error.

E. H. BEALL, *contra.*

By the Court.—BENNING J. delivering the opinion.

Did Elbert Melton have the right to appeal without giving security? The Court below held that he had.

And, it is clear, he had, if the suit against him, was against him as administrator. The Judiciary Act, of 1799, says so.

The question, then, is, was the suit against him as administrator?

It may be assumed, that a suit against a person who is an administrator, is against him as administrator, if the suit is one to which, he may plead as administrator; and the decree in which, may be against him as administrator; one the title set up in which, is good against him only as administrator, and one the prayer in which, is against him as administrator.

The bill states, that, Irving is the guardian of Elizabeth, Sarah, and Quiney Melton, orphans of McKinney Melton, deceased; who died in 1840, leaving an estate of some \$10,000, or \$15,000, consisting in part of lands and negroes; that Elbert Melton was appointed his administrator; that, McKinney Melton left a widow, and, a number of other children; that, in 1853 the complainant applied to the Court of Ordinary, for an order requiring the administrator to pay over and deliver to him, complainant, all the property

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coming to his wards; that, after twenty days notice of this application had been given to the administrator, the order was passed as applied for; that, Melton had failed to make his annual returns.

That, he realized from the sale of the property \$14,000; that one Jones owed the intestate, at the time of his death, \$1500, for certain lands purchased by him, Jones, of the intestate, and that, the administrator "made a rue" with Jones, and in it, gave up to Jones, his notes for the purchase money, and received back the land, and a negro man, named Jesse, to boot; that, the administrator has appropriated these lands, and this negro, to his own use, whereas they are, as the complainant charges, the property of the intestate; that, the lands of which the intestate died seized, except the widow's dower, had been sold by the administrator, at administrator's sale, for \$3000, to four-ninths of which sum, as also, to four-ninths of all the property of the intestate, the complainant's wards were entitled; that, the administrator had received \$400 in rents, and, \$1000 in hire of the negroes; that, from the cash on hand, and the sale of personal property, he had realized \$10,000; that the complainant had made repeated applications to him, for the "distributive share" of the estate, coming to his wards.

The bill prays, that an account may be taken; and that what shall be found "due and coming to the wards of" complainant, "from him the said Elbert Melton, as administrator," he shall be decreed to be paid over to him, the complainant, "as guardian as aforesaid." And there is, the general prayer.

This is the bill. And, certainly, this is a bill to which, would lie, a plea or answer made by Elbert Melton *as administrator*. A plea, or answer, that he had paid away all the assets to debts, or, to legatees under a will annexed to his administration, would be a complete bar to the bill. And these are pleas confined to an administrator *or* an executor in his representative character.

So, this bill is one in which, a decree may be had against

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Elbert Melton, as administrator for the wards' shares. Indeed, a decree against him in that character, is all that the special prayer asks for; and, with the special prayer in this respect, the general prayer will well consist. But even if that were not so, even if the decree would have to be against him personally, for any cause; as a waste of the assets, yet that would not prove him to have been sued personally; for, in equity, the judgment may be against the defendant, in his personal character; or, against him, partly in that character and partly in his representative character, although, the suit itself may be against him, only in his representative character. If he has wasted the assets, the decree is against him personally, that he pay their value; if he has wasted some of the assets, but has some on hand in specie, the decree is against him personally, as to the part wasted, that he pay their value and, representatively, as to the part on hand in specie, that he distribute them.

The title which the complainant sets up in the bill, against Elbert Melton, is a title against him as administrator. That is, that his wards are of the next of kin of McKinny Melton, deceased, and that, as such, they are entitled to have their shares of McKinny Melton's estate. Such a title as that, is good only as against the administrator of that estate, for if asserted against any other person, on an allegation, say, that this other person has the estate in his possession, this person may plead, that there is an administrator to whom he is bound to account.

Finally, the special prayer to the bill is a prayer against Elbert Melton "*as administrator*."

We think, then, that the suit is against Elbert Melton *as administrator*, and therefore, that he had the right to appeal without giving security.

Judgment affirmed.

McDONALD J. absent.

Sanderlin et al., vs. Sanderlin, adm'rs.

**SARAH E. SANDERLIN, and others, plaintiffs in error, vs.
JESSE and WILLIAM SANDERLIN, administrators, defendants
in error.**

When a case is brought up to this Court a second time, with no new facts to change substantially the view of it taken before, it only remains for this Court to re-affirm its first judgment, by affirming generally the judgment of the Court in attempting to enforce it.

In Equity, from Randolph county. Tried before Judge KIDDoo, at the May adjourned Term, 1858.

This case was before the Supreme Court at January Term, 1858, and is reported in 24 *vol. Ga. Rep.*, p. 583.

It was a bill filed by Sarah E. Sanderlin, and others, heirs and distributees of Henry Sanderlin, deceased, against Joseph and William Sanderlin, administrators of said Henry, for an account and distribution of a slave named Elias, which plaintiff alleges belonged to the intestate, and which the defendants have failed and refused to administer and distribute, as part of said estate, but have converted the same to their own use.

The answers deny that said slave belonged to said Henry at the time of his death, but insist that he was the property of the said Jesse Sanderlin, one of the administrators, and the father of said deceased, and that said slave was held by said Henry, as a loan from his father.

The Court, after the close of the testimony, at the request of the defendants' counsel, charged the jury, that in deciding whether the negro was a gift or a loan, they were to be governed by the weight of testimony; that when two witnesses swear differently, or contrary one to the other, they should believe that witness who has no interest, either from pecuniary considerations, or relationship, in preference to one who may be thus biassed, other things being equal; but it was their province to judge of the credibility of witnesses; that the answers of defendants, as to the nature of the possession, are responsive to the bill, and therefore evi-

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dence of a loan, unless overcome by two witnesses, or one witness, and corroborating circumstances; that although the negro may have been given in the first instance, still if Henry Sanderlin, afterwards admitted, that he was to be held as a *loan*, that he had the right so to agree to hold him, and his admissions are evidence, from which the jury may infer that there was a re-delivery, and a change from a gift to a loan; but they were not bound so to infer; and that Henry Sanderlin's wife and children are bound by his acts and admissions; that it was not necessary that Jesse Sanderlin should have purchased back the negro in order to constitute it a loan; that although Jesse Sanderlin may have intended to give the negro to his son, still the jury are authorized to infer a change to a loan, if the son afterwards admitted that he held him as a loan; and if it was so understood by Jesse and Henry Sanderlin, at the period of the latter's death, then they were authorized, but not bound, to infer that every thing was done that was necessary, to convert the gift into a loan; that even if Henry, the son, consented to this for the purpose of defrauding his creditors, he and his heirs are bound by it.

That if the slave went into the possession of the son as a gift, and the donor and donee afterwards rescinded the gift, and agreed to make it a loan, then it became a loan, and so remained, and no person has a right to interfere with it; to all of which charge complainants excepted.

The jury found for the defendants, and counsel for complainants tendered their bill of exceptions, and assign as error the foregoing charge of the Court. And further, that

Court erred, in allowing counsel for defendants, to ask the witness, Isaiah Holmes, if he did not tell James Newton, in 1855, that he, witness, had told William Johnson "that Elias did not belong to him or Henry Sanderlin, but to Jesse Sanderlin, and he had known it all the time, as Jesse had paid taxes on him."

And further, that the Court erred in permitting defendants'

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counsel to introduce, in evidence, the tax books of 1848, 1849, 1850 and 1851, plaintiffs' counsel objecting thereto, upon the ground that it was not rebutting evidence.

PERKINS; BARRY; and HOOD & ROBINSON, for plaintiffs in error.

DOUGLASS & DOUGLASS, *contra*.

By the Court.—LUMPKIN, J. delivering the opinion.

This case was before this Court twelve months ago, at this ce, (24 Ga. Rep., 583) and we see nothing new in it to disturb the view then taken of the law of the case, and the rights of the parties. True, some of the testimony taken then is not in the record now, still we do not see that the result is substantially changed. We affirm generally, therefore, all the rulings of the Court.

Judgment affirmed.

McDONALD J. absent.

CHARLES WALKER, et al., plaintiffs in error, vs. WILLIAM HUNTER, et al., heirs at law of Charles Hunter, deceased, defendants in error.

A Court of Equity has jurisdiction to compel the cancellation of a deed procured without consideration, and by undue influence.

In Equity, from Twiggs county. Decision on demurrer, by Judge LAMAR, at September Term, 1858.

This was a bill in equity, filed by William Hunter and

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others, heirs at law of Charles Hunter, deceased, against Charles Walker and David S. Walker.

The bill states, that one William Hunter, by his last will and testament, devised and bequeathed to Charles Hunter, an aged and imbecile brother, and who was living with him at the time of his death, among other things, a valuable tract of land, containing about twelve hundred acres, lying in the county of Twiggs, and on which the two brothers resided. That said Charles continued in possession of said premises, after the death of his brother, until his own death, which happened in 1851 or 1852.

The bill further states, that said Charles was a man of weak and imbecile mind, and was entirely under the control and dominion of Charles Walker, one of the defendants; that said Charles managed his property, and attended to and transacted his business, and directed and regulated his bounties; and the said Charles Hunter was so completely under the control and mastery of said defendant, that he would transact no business without his consent or approval. That said defendant, by fraudulent means and conduct, procured the execution of such deeds and wills, by said Charles Hunter, as conveyed and bequeathed his whole estate to defendant and his children.

The bill further states and charges, that defendant, by undue influence over deceased, fraudulently procured the execution of a deed of gift, conveying the plantation and lands on which he resided, being the same devised to him by his brother, as before stated. That said deed was procured against the will and consent of said Charles Hunter, and that by reason of his imbecility of mind, and the control and dominion exercised over him by defendant, said Hunter was incapable of making said deed.

The bill further states, that said defendant, after the execution of said deed by fraudulent practices, procured said under to execute a will, by which the balance of his proper-

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ty was given to defendant, &c. That said Charles Hunter has departed this life, and defendant is now propounding said paper for probate, and to which a caveat has been filed.

The bill further states, that since the death of said Charles Hunter, the said Charles Walker, who resides in the State of Alabama, has taken possession of the lands conveyed to him by said deed of gift, and his son, the said David S. Walker, is occupying and cultivating said premises, holding and claiming under his father, by virtue of said pretended and fraudulent deed; and that complainants have brought their action of ejectment against said David S. Walker, as tenant in possession of said lands, and the same is now pending on the appeal, in the Superior Court of Twiggs county, and that all the title deeds of said lands are in the hands and possession of defendants.

The prayer of the bill is, that said deed may be cancelled and set aside as void and fraudulent, &c.

To this bill defendants demurred for want of equity, and because complainants had adequate remedy at law.

The Court overruled the demurrer on both grounds, and ordered the defendants to answer.

To this judgment defendants excepted.

CROCKER & CROCKER; S. T. BAILEY; and A. P. POWERS, for plaintiffs in error.

POE & GRIER; NISBETS; and COLE, *contra*.

By the Court.—BENNING J. delivering the opinion.

Was the Court below right, in overruling the demurrer? We think so. If the bill be true, the deed was procured without consideration, and by undue influence; and a deed so procured, is fraudulent and void. The demurrer admits the bill to be true, and therefore, admits the deed to be fraudulent and void.

Equity has jurisdiction to compel the cancellation of such

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a deed, for a cancellation of it, is the only complete and adequate relief against it. As long as it remains uncancelled, it can be used as an instrument to annoy—at least, it is a cloud over the true title. Hence, the ability to resist it at law, is not full protection against it; and that ability wears away with time, and the decay of evidence. Therefore, equity will take hold of the deed and cancel it. *2 Story Eq. sec. 700; Watson vs. Bond, 22 Ga. 637.*

Judgment affirmed.

**WILLIAM LANE, tenant in possession, plaintiff in error, vs.
SARAH E. HOLLIDAY, et al., lessors, defendants in error.**

One ground of a motion for a new trial, was, newly discovered evidence, viz, a judgment which would operate as an estoppel, on the other party. The evidence received, contained nothing about any judgment at all.

Held, That the newly discovered evidence was evidence that was "not merely cumulative in its character."

Ejectment, from Dooly county. Tried before Judge LAMAR, at October Term, 1858.

This was an action of ejectment by John Doe, upon the several demises of Sarah E. Holliday, administratrix of James Collins, deceased, and Sarah E. Holliday and Joseph Collins, heirs at law of said James Collins, against Richard Roe, casual ejector, and William Lane, tenant in possession, for the recovery of fractional lots Nos. 37, 38, 39 and 92, containing in all three hundred and forty-nine acres, one rood, and eight poles, and situated in the fifteenth district of Dooly county.

The jury found for the plaintiff the undivided one-half of fractional lots Nos. 37 and 38.

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Whereupon, the defendant moved for a new trial upon the following grounds, to-wit:

- 1st. Because the jury found contrary to the evidence.
- 2d. Because, since the trial, the defendant has discovered evidence material to the issue, which was not within his knowledge before or at the time of said trial.

The Court refused the motion for a new trial, and defendant excepted.

SAM. HALL; and CLARK & LIPPETT, for plaintiff in error.

P. J. STROZIER, *contra.*

By the Court.—BENNING, J. delivering the opinion.

Was the Court below right, in overruling the motion for a new trial?

The second ground of the motion, was, newly discovered evidence. The Court below, we are told, considered the newly discovered evidence, "merely cumulative in its character;" and therefore held the ground insufficient. In this, we differ with that Court. We think, that the evidence, was evidence that was "not, merely cumulative in its character." It was evidence that amounted to an estoppel by judgment, on Mrs. Holliday. In the former suit, (in Dooly,) she and her husband, Holliday, sued Wm. Collins, the administrator of her first husband, James Collins, for this same land, or, for an account of it, and there was a recovery against her, and, on the ground, that her first husband, James Collins, had sold the land, in his lifetime. There was evidence on the trial of the present case, going to show, that Lane, the tenant in possession, claimed under one Goodman, and that this Goodman had bought the land from the said first husband, James Collins. These things being so, the judgment would stop Mrs. Holliday, as against the administrator of James Collins, and all claiming under him, or, under William Collins, for

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he represented James Collins. At all events, it may be assumed, that this judgment would estop Mrs. Holliday, as to her present suit, for it was not denied in the argument, that it would estop her, the ground taken in the argument, being, that the judgment would be only cumulative evidence.

The precise point for us, therefore, is no more than this; would the judgment, assuming it to amount to an estoppel, be merely cumulative evidence. And we say, on that question, that we see, in the evidence, nothing to which we can regard the judgment, as cumulative. There is, in the evidence, nothing even hinting at any former recovery—nothing to show, that the tenant had any right of any sort, by virtue of any judgment in any case in which Mrs. Holliday was a party.

We think, then, that this was a good ground. It is unnecessary to consider the other ground.

Judgment reversed.

**ELIZA ISABELLA CARMICHAEL, executrix, plaintiff in error, vs.
ADOLPHUS STRAWN, and others, defendants in error.**

- [1.] One entry of *no personal property*, on a Justice's Court *fi. fa.*, is sufficient to justify a constable in levying the *fi. fa.* on land.
- [2.] The price at which, land was knocked off to a bidder, by the Sheriff, was fifty two dollars. The deed made by the Sheriff to the bidder, acknowledged the receipt of \$52, and was silent as to the other two dollars. But on the back of the *fi. fa.*, there were entries showing, that the whole \$52, had been properly appropriated by the Sheriff.
Held. That the deed was admissible in evidence.
- [3.] Seven years possession of the land purchased from the defendant in a *fi. fa.*, must follow the purchase, in order to exempt the land, from levy and sale under the *fi. fa.*. Registration of the deed made to the purchaser, will not do in place of this possession.

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Ejectment, in Lee Superior Court. Tried before Judge ALLEN, at October Term, 1858.

This was an action of ejectment, by Robert D. Carmichael, against Adolphus Strawn, and others, for the recovery of lot of land number 94, in the second district of Lee county. Pending the suit Carmichael died, and his executrix was made a party plaintiff.

Upon the trial, plaintiff introduced a deed from William Berry to Robert L. Foster and James B. Nabers, for the lot in dispute, dated 7th October, 1844, and recorded 4th December, 1844. Then a deed from Foster to Nabers for same lot, dated 21st October, 1846, and recorded 13th February, 1850. Then a deed from Nabers to Robert D. Carmichael, dated 29th January, 1850, and recorded 13th February, 1850.

It was admitted that defendants were in possession at the commencement of the action, and had been in possession from the date of their purchase, the land being unoccupied before that time. Here plaintiff closed.

Defendants opened by introducing a deed from the Sheriff of Lee county to James T. Holman, dated 7th June, 1853, and recorded 16th March, 1854, to the premises in dispute, said land having been sold by the Sheriff of Lee county, under a Justice *fi. fa.* from Gwinnett county, against William Berry. *Fi. fa.* dated 28th December, 1840. Under this *fi. fa.*, the land in controversy was levied upon and sold as the property of William Berry, and bought by defendant for \$52 00. Sale day in June, 1853. The *fi. fa.* had been assigned to Matthew Crawford, January 7th, 1853, and endorsed thereon were the following entries:

“No property to be found to levy this *fi. fa.* on, this 25th January, 1845.

(Signed)

P. R. BERRY, *L. C.*”

Carmichael, ex'x, vs. Strawn et al.

"No property to be found to levy this *fi. fa.* on by me, this 26th December, 1851.

(Signed)

PRITTMAN BERRY, *L. C.*"

"GEORGIA, LEE COUNTY.

To any lawful officer to execute and return, this 5th Feb. 1853.

(Signed)

J. W. BRYAN, *J. P.*"

"Levied the within execution on No. ninety-four, in the second district of Lee county, this 7th Feb., 1853.

(Signed) THOMAS C. FELLYAU, *Const.*"

"The within levy sold and brought \$52, and after paying all costs, commissions and advertising fees, leaves a credit of \$40 44 on said *fi. fa.* June 3d, 1853.

G. B. MAYO, *Sh'ff.*"

"Rec'd of G. B. Mayo, Sh'ff, Forty 44-100 Dollars, raised by the sale of the within levy, 7th June, 1853.

JAS. T. HOLMAN,

as agent of Matthew Crawford."

Plaintiff objected to the introduction of the deed from the Sheriff.

1st. Because it did not appear that there was an entry on the *fi. fa.* of no *personal* property, before it was levied upon the land, and that such entry should have been made by an officer of Lee county, before a levy could be made upon the land.

2d. Because said land sold for \$52 00, and it is stated and recited in said deed, that only fifty dollars had been paid.

The Court overruled the objections and admitted the deed, and plaintiff excepted.

Defendant then introduced a deed from James T. Holman to defendants, dated 9th January, 1854, and recorded 5th May, 1854, for the land in dispute, and closed.

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Plaintiff's counsel then asked the Court to charge the jury, 1st. That if they believed from the evidence that said lot of land sold for \$52 00, and the purchaser paid only \$50, that said deed to him was void.

2d. That if they believed that Carmichael purchased this land more than seven years previous to the Sheriff's sale, and no one was in possession during that time, and his deed was on record, that then said lot of land was not subject to said *fi. fa.*, and the sale thereof passed no title to the purchaser at Sheriff's sale.

The Court refused to give these charges, and plaintiff excepted.

Verdict for defendant, and plaintiff tenders his bill of exceptions, &c.

VASON & DAVIS, for plaintiff in error.

MCCAY & HAWKINS, *contra*.

By the Court.—BENNING J. delivering the opinion.

[1.] Neither of the two objections to the deed, was good, as we think. A similar objection to the first, was held by this Court, in *Hollingsworth vs. Dickey*, (24 Ga.) not to be good.

[2.] As to the second, the entries on the *fi. fa.*, show, that the whole \$52 for which, the Sheriff sold the land, was properly accounted for by him, was paid by him, partly to costs and commissions, partly to the plaintiff in the *fi. fa.*. The recital in the deed, that fifty dollars was paid for the land, is thus shown to have been, a mere mistake—the word, two, having been accidentally omitted, after the word, “fifty.”

Besides, does an objection of this sort, lie in the mouth of the plaintiff, who was neither a party nor a privy, to the *fi. fa.*, for, although, she claimed under Berry, the defendant in the *fi. fa.*, yet she did so, by a deed of Berry's, made long before the Sheriff's sale.

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An entry, of "no property," includes the entry of, no *personal* property.

The jury could, hardly, have believed, that the purchaser from the Sheriff, had paid only \$50. There were the entries on the *f. fa.*, to show, that he had paid the whole \$52. If, then it were true, that the first request was one that was right in itself, yet as no new trial was moved for, this Court ought not to grant a new trial, on the refusal of that request.

The Court, we think, was right in refusing the second request.

[3.] It is true, that the plaintiff in the case, claimed under a purchase from Berry, the defendant in the *f. fa.* aforesaid, which was an older *f. fa.* than such purchase, and, that such purchase took place more than seven years before the levy and sale of the land by the Sheriff for the \$52; but, it is also true, that at the time of this sale by the Sheriff, neither the purchaser, nor, indeed, any one else, had ever been in possession of the land. And the statute gives the exemption, only in cases in which the purchaser from the defendant in the *f. fa.*, has been in "peaceable possession," for seven years before the levy. *Pr. Dig.* 252.

The regular registration of the deed of the purchaser, obtained from the defendant in the *f. fa.*, is not equivalent to "peaceable possession" of the land by him. At least, the statute does not say so, and the statute is that which we have to go by.

Judgment affirmed.

McDONALD, J. absent.

Crozier vs. Berry.

NANCY CROZIER, plaintiff in error, vs. SAMUEL BERRY, defendant in error.

When a witness is rejected for incompetency, the cost for his attendance can only be collected out of the party at whose instance he was subpœnaed.

Subpœna *fi. fa.* and illegality, from Randolph county. Decision by Judge KIDDOO, at November Term, 1858.

The following is the agreed statement of facts, upon which the judgment in the Court below was pronounced, viz:

In an action between Nancy Crozier and John Crozier, in which said Nancy was plaintiff, Samuel Berry was subpœnaed as a witness by said Nancy. Upon the trial Berry was sworn as a witness, but was objected to on the ground of interest; the objection was sustained, and the witness put aside. The case proceeded however, and said Nancy succeeded in obtaining a judgment, and the witness, Berry's, fees were taxed and inserted in the *fi. fa.* issued upon the judgment against the defendant.

It further appeared, that upon illegality or some proceeding had by defendant, the amount of Berry's fees were stricken out. Whereupon, Berry proved his subpœna, a *fi. fa.* issued thereon, against Nancy Crozier, by whom the witness was subpœnaed, as provided by statute.

To this *fi. fa.* Nancy Crozier filed her affidavit of illegality. The Court dismissed the illegality, and counsel excepted.

HARRIS & STEWART, represented by PERKINS, for plaintiff in error.

DOUGLASS & DOUGLASS, represented by ROBINSON, *contra.*

By the Court.—LUMPKIN J. delivering the opinion.

Under the Judiciary Act of 1799, the witness is entitled to prove his attendance and collect his cost out of the party at whose instance he is subpœnaed. True it may be taxed in

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the bill of cost, and collected out of the party cast; but here this could not be done; because the witness was rejected for incompetency. And in a case made, the Court has decided that the defendant was not liable. Of course, the cost must be paid by the party at whose instance the witness was sub-pœnaed. It may be, and perhaps is, a hard case. We see no help for it.

Judgment affirmed.

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**JOHN T. HOWARD, plaintiff in error, vs. DAVIS E. GRESHAM,
claimant, defendant in error.**

- [1.] A mortgage lien on land may be released in whole or in part, by parol, upon the payment to the mortgagee of the price of the property.
Ordinarily a judgment of foreclosure, bars only the rights of the mortgagor, his heirs and legal representatives.
[2.] Payment may be pleaded to a suit at the instance of the assignee, upon a note transferred after due and secured by mortgage.

Claim, from Early county. Tried before Judge KIDDOW, at September Term, 1858.

On the 12th December, 1851, James B. Brown, executed a mortgage of certain lands to E. B. Lightfoot, to secure the payment of certain notes. The notes bore even date with the mortgage. In February or March, 1854, Lightfoot assigned the notes and mortgage to John T. Howard, for valuable consideration. Howard proceeded to foreclose the mortgage, and upon obtaining judgment, issued a *fi. fa.*, under which the land mortgaged was levied upon, and advertised to be sold. Thereupon, Davis E. Gresham interposed a claim to a part of said land.

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Upon the trial of this claim, plaintiff in *fl. fa.* proved that the land levied on, was the same as that embraced in the mortgage, and upon which Brown went into possession under Lightfoot, about the last of the year 1851, and cultivated the same about two years, and that claimant went into possession under purchase from Lightfoot. That Lightfoot was in possession from 1845, until his sale to Brown.

Claimant proved by Ann E. Poole, examined by commission, that in 1854, she heard Lightfoot tell Gresham, the claimant, that when he, Lightfoot got the money that witness's father had given him an order for, he would release the land from the mortgage.

Claimant then introduced and read in evidence the following letter:

CUTHBERT, January 5th, 1854.

Col. Strafford:—Please see Brown and Mulligan and get all the money you can send by the little boy, I am in a great *tite* for money. Say to Gresham that I collected the Bass note. I have killed his note and given Brown credit for the balance. The balance after paying the Gresham note, was \$134 25. I send the note which you will please hand to Gresham, and let him have Brown give him credit for the above amount. We are all well, &c.

(Signed,) _____

E. B. LIGHTFOOT.

John T. Howard, plaintiff in *fl. fa.*, testified, being called by claimant, that he sold his interest in the livery stable in Cuthbert to Lightfoot, receiving the notes and mortgage in payment. He took the notes and mortgage in good faith, and without any knowledge that there was any payment or release of any part of the property.

Plaintiff's counsel proposed to ask him, being a witness, if he did not have a conversation with Brown, and whether Brown said there was any release or claimed any. Claimant objected to the question. The Court sustained the objection, and plaintiff's counsel excepted.

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1st. The Court charged the jury, that if Lightfoot, while he held the mortgage, made a verbal promise to release the premises upon the payment of a certain sum of money, and the claimant paid the amount, then the land was exempt and discharged from the mortgage lien as against Lightfoot.

2d. That if Howard obtained the notes and mortgage after the notes became due, then all the equities existing between claimant and Lightfoot, attached and existed against him; and that the agreement to release the land upon the payment of the money, if complied with by claimant, would discharge the lands from the mortgage and notes in the hands of Howard, and the jury must find for claimant. To which charge plaintiff excepted.

The jury found for the claimant, and plaintiff moved for a new trial upon the following grounds:

- 1st. Because the jury found contrary to law.
- 2d. Because the jury found contrary to evidence.
- 3d. Because the Court erred in its charge to the jury.

4th. Because the Court erred in admitting evidence against the objection of counsel, of a verbal release of the premises by Lightfoot.

The Court overruled the motion for new trial, and plaintiff excepted.

HOOD & ROBINSON, for plaintiffs in error.

LAW & SIMS, *contra*.

By the Court.—LUMPKIN J. delivering the opinion.

The record in this case is so defective, that a satisfactory judgment can hardly be rendered upon it. We have no copy of the mortgage or of the note, upon which it is founded. We cannot tell whether Gresham's deed was recorded before the transfer was made to Howard, nor whether Gresham was in possession of the land at that time. Indeed, neither

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the bill of exceptions, nor the transcript of the record, shows whether the mortgage note, together with the security, were transferred to Howard by Lightfoot before or after the sale by Brown to Gresham. It is assumed in the charge of the Court, and that charge is not complained of, that the transfer was subsequent to Gresham's purchase, and the case is argued on both sides, upon that hypothesis.

The first question made is, whether the land bought by Gresham, and which was included in the mortgage, could be released by parol from the lien of the mortgage? *In Johnson against Worthey*, (17 Ga. Rep., 420,) this Court held, that a parol rescission of a contract in writing and under seal for the sale of land, may be admitted as sufficient evidence of such release, if the rescinding contract has been executed. And so the Court ruled here, viz: that if Gresham had paid to Lightfoot the money for that portion of the mortgaged land bought by Gresham of Brown, that then the parol release by Lightfoot, the mortgagee, was good.

We think this proof was admissible in another aspect of it. And that is, that it was a satisfaction *pro tanto*, of the mortgage debt. Suppose the whole debt had been paid, would not the mortgage lien have been *ipso facto* discharged? No release would have been necessary. Well, if the value of this piece of land, contained in the mortgage, was paid by Gresham to Lightfoot, and accepted by him, was it not a satisfaction of the mortgage, *pro tanto*? And would not a Court of Equity protect that part of the land from the mortgage?

It is argued, that in as much as Gresham bought of Brown, and the mortgage has been foreclosed as to Brown, Gresham is estopped, because a privy in estate with Brown. We suppose that the mortgage was only foreclosed for the balance due, after crediting the payment made by Gresham to Lightfoot. But be that as it may, this Court decided in *Jackson against Stanford*, (19 Ga. Rep. 14,) and in several other cases, before and since, that the judgment of foreclosure does not

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bar the rights of any person except the mortgagor, his heirs and legal representatives. And that one who had acquired a title or claim to the mortgaged property, might assert his rights whenever disturbed by the mortgage execution.

But the main point in this case is this. If Lightfoot, the mortgagee, while he owned the notes and mortgage, given to secure them, agreed to accept from Gresham the payment of a certain sum of money, and release the lien on Gresham's land, and after that, and after the notes were due, transferred the notes and mortgage to Howard, can Gresham set up this equity against Howard? Why may he not? Why, because a note is secured by mortgage, is it to be taken out of the operation of the rule regulating other paper? But for the mortgage, there can be no doubt this equity would come in. Why should the fact of the mortgage exclude it? Shall it be replied, that a note secured by mortgage, is not expected to be paid at maturity; and that the failure to pay such a note punctually, attaches no dishonor to it? We do not concede the distinction. Mercantile paper, even bank debts, are sometimes secured by mortgage.

But grant that this were so, had Brown satisfied this debt *in toto*, would he not be entitled to make this defence against Howard, the assignee? It is not disputed, but that he could. Why should not Gresham, who purchased a part of the mortgage land, settled with Lightfoot for it, be entitled to the same right? Is not Gresham upon as good a footing, if not better, than Brown? We think so.

Judgment affirmed.

May et al., vs. Goodwin.

7 352
5 608 | PLEASANT L. J. MAY, and others, plaintiffs in error, vs. THEODORE A. GOODWIN, defendant in error.

An objection to a bill on the ground that the complainant has an adequate remedy at law, comes too late at the hearing. It should be taken advantage of the first opportunity by plea or demurrer; otherwise it will be considered as waived.

In Equity, from Macon county. Decision by Judge LAMAR, at September Term, 1858.

This case was before this Court at June Term, 1857, and is reported in ~~2d~~, Ga. Rep., where the facts will be found duly stated. *Can't find them.*

The following is the judgment pronounced by the Supreme Court upon the former hearing:

"THEODORE A. GOODWIN, plaintiff in error, vs. PLEASANT L. J. MAY, et. al., defendants in error.

This case came before the Court upon a transcript of the record from the Superior Court of Macon county, and after argument had, it is considered and adjudged by the Court, that the judgment of the Court below be reversed upon the ground, that that Court erred in holding, that a conditional parol sale of personal property, was not good against a mortgage given by the purchaser to a creditor who had no notice of the defect in the title."

The case by order of the Court below, was reinstated upon the appeal docket, and the aforesaid judgment of the Supreme Court, made the judgment of said Superior Court.

The case coming on for trial at September Term, 1858, counsel for the defendants, moved to dismiss the bill on the ground that complainant had full and adequate remedy at law, and that a Court of Equity has no jurisdiction of said cause as made by the bill.

The Court overruled said motion, and ordered the cause

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to proceed. Whereupon, counsel for defendants excepted, and assigned as error said decision.

COOKE & MONTFORT ; GEO. R. HUNTER ; and M. H. BLANDFORD, for plaintiffs in error.

SAM HALL, *contra*.

By the Court.—LUMPKIN, J. delivering the opinion.

We are inclined to think that this is a good bill. The claimants or mortgagees, by discharging complainant's demand, would entitle themselves to the balance of the money arising from the sale of the furniture.

Were it otherwise, it is too late to move to dismiss the bill for want of equity, because the complainant had a common law remedy. A motion to dismiss a bill for want of equity, proper, may be made at any time. As for example, if a bill be filed for the specific performance of a parol contract respecting land ; and it appears from its face, that the agreement is clearly within the statute of frauds, a motion to dismiss for want of equity may be made at the final hearing.

There are some cases, where the judgment of a Court is void for want of jurisdiction. As where the Ordinary grants letters of administration out of the county of the intestate's residence at the time of his death. And this also, may be taken advantage of at any time. But who doubts the decree rendered in this case, notwithstanding there may have been an adequate and ample remedy at law.

In this State it is frequently rather a question of convenience, than of jurisdiction strictly. And for the defendant to litigate for years, as the defendant in this case has done, and the case is about to be submitted to a jury for a final determination, then to move to dismiss because the party has a common law remedy, the objection comes too late. If the

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fact be so, the defendant should have taken advantage of it by plea or demurrer, otherwise, he will be adjudged to have waived it. A different practice would involve an amount of delay and expense, that would be oppressive in the extreme.

The Act of 1820, dealt a deadly blow to the partition wall, which separated the two forums, equity and common law; it has tottered and crumbled more and more under the subsequent legislation, until the great Chinese wall, which so long divided these Courts, may now be passed by a suitor or pleader, almost without knowing it. An Act of three lines, I repeat it again and again, authorizing the jury at law to frame their verdict to meet the equity of the case, and the folly of ages, is obliterated.

Judgment affirmed.

27	354
13	508
27	854
10	532
27	354
21	737
27	354
15	347
15	527

JOHN B. VANOVER, and others, plaintiffs in error, vs. JESSE M. DAVIS, et al., Justices of the Inferior Court, and others, defendants in error.

[1.] By the 12th section of the Act of 1856, the Inferior Court of Terrell county, were authorized to collect an extra tax for *county purposes*, of such per cent on the State tax, as to the said Court might seem necessary and proper. From the sale of town lots the Court House had been paid for, and likewise the jail, lacking \$1,300, and there were some \$4,000 of assets still in hand. Three Justices of the Court met in chambers, and after imposing 50 per cent. on the State tax for *county purposes*, and ten per cent for bridges, they assessed 200 per cent. on the State tax, for "Public Buildings."

Held, That this latter tax was without authority of law and void.

[2.] The provision in the 21st section of the Tax Act of 1804, prohibiting judicial interference with the levy and collection of taxes imposed by that Act, does not extend to county and corporation taxes, nor to taxes which are not authorized by that Act, and the general tax Acts amendatory thereof.

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[3.] Where the tax payers of a county resist the collection of a tax, they may unite by bill, asking an injunction, and each will not be driven to his affidavit of illegality.

In Equity, in Terrell Superior Court. Decision by Judge KIDDOO, at November adjourned Term, 1858.

This was a bill in equity, filed by John B. Vanover, Richard R. Roby, and others, (about ninety in number,) citizens and tax payers of Terrell county, against the Justices of the Inferior Court and the tax collector of said county, praying for an injunction to restrain the collection of a tax of *two hundred per cent.* ordered by the said Inferior Court to be assessed and levied "on the State tax, for public buildings." Said order was passed 14th August, 1858, by said Court in *chambers*, and signed by three of the Justices, these being all that were present.

The bill makes four grounds or points of objection to the said order :

1st. Because the same was not passed in Term time, and while said Justices were in session as a Court.

2d. Because said extraordinary tax was not authorized by law.

3d. Because all the public buildings of the county had been erected, and there was in the hands of the county Treasurer, funds more than sufficient to pay the amount remaining due on said buildings.

4th. Because there was no legal liabilities or debts outstanding against said county, which made it necessary to raise any sum of money by taxation.

The Court refused to grant the injunction as prayed, and counsel for complainants excepted.

LYON, IRWIN & BUTLER; and HARPER, for plaintiffs in error.

McCAY & HAWKINS, *contra*.

Vanover et al., vs. Jus. Inf. Court.

By the Court.—LUMPKIN J. delivering the opinion.

[1.] Three of the Justices of the Inferior Court of Terrell county, met at chambers, August, 1858; and amongst other things, assessed a tax of two hundred per cent. on the State tax, for "Public Buildings." Its collection is resisted by a bill for an injunction, by a portion of the tax payers of Terrell county, and the only questions which we deem it necessary to decide are: 1st. Have the Justices the power to levy this tax? 2d. Has the Judiciary the power to interfere? And 3d. Is this a case for chancery?

By the 4th section of the Act of 1856, "the Justices of the Inferior Court of Terrell county, after they have been commissioned and qualified, shall have full power to select and locate a place for the Public Buildings in said county; and they, or a majority of them, are authorized and invested with full power to purchase a tract of land for the location of the county site; and to make such other arrangements and contracts, concerning the location of the Public Buildings, as they may think proper." (*Pamphlet*, 117.)

It is obvious that the Legislature did not suppose they were delegating any taxing power in this section. They foresaw that none would be needed, so far as the erection of Public Buildings were concerned. The Court House has been built and paid for. There is a balance only of \$1,300 due for the jail; and there is a fund still in hand arising from the sale of town lots, or the value of lots retained, greatly more than enough to extinguish this debt.

The 12th section of the Act creating this new county, is that which contains the grant to levy an extra tax. It is in these words: "That the Inferior Court of said new county, shall have power to levy and collect an extra tax for county purposes, of such per cent. on the State tax, as to the said Court may seem necessary and proper." (*Ibid*, 119.)

But this grant does not cover Public Buildings. It is to raise funds for "county purposes," viz; To support the poor,

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educate poor children, &c. &c. So it will be seen, that no direct authority has been conferred to impose a tax for Public Buildings, because none was needed. And yet, in addition to a tax of fifty per cent. for *county purposes*, and ten for bridges, the three members of the Court imposed this enormous tax of two hundred per cent. for "Public Buildings!" Not only without authority, but when not a cent was needed for that purpose.

No power should be more carefully guarded than the taxing power. It is threatening a civil revolution at the North. It is felt to be a crying evil in all of our towns and cities. It begins to be abused even in the counties. The cause of this abuse is well understood.

[2.] Has the Judiciary the right to interpose?

It is insisted that this power has been taken from the Courts, by the 21st section of the tax Act of 1804. It reads thus: "The tax imposed by this Act, shall be paid and collected in specie, bank bills of the United States, or of the different branches thereof, Governor's, President's and Speaker's warrants, agreeably to the orders of the present Legislature, and nothing else. *And no replevin shall lie, or any judicial interference be had, or any levy or distress for taxes, UNDER THIS LAW, but that the party injured be left to his own proper remedy in any Court of Law.*" (Cobb, 1051.) The judicial interference forbidden here is, for any levy or distress for taxes, under the Act of 1804, which is still in force, and the basis of all our general tax laws. By strict construction, the inhibition would only apply to the Act of 1804. It is but right, however, to extend it to all tax laws in favor of the State, and amendatory to the Act of 1804. But it never was meant to be incorporated in local tax laws in favor of counties, municipal corporations. And it would be great calamity if it did.

But apart from this plain and palpable view of the case, the prohibition applies only to taxes properly laid under the Act of 1804, and Acts amendatory thereof. { But suppose, as |

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in this case, the Inferior Court assumes jurisdiction to levy a tax without authority of law to do so, or the ministerial officers of the State undertake to collect a tax on property, not only not taxable, but expressly exempted from taxation, would not the Courts arrest such an attempt, that not being a tax authorized by the Act of 1804, or any subsequent statute amendatory thereof? Most clearly.]

We hope the profession and the public will apprehend this distinction, and that there will be less doubt and confusion upon this subject.

[3.] We approve the remedy resorted to in this case. It is not only more complete than any other, but the only one in our judgment which meets the exigencies of the case.

We preferred putting our decision upon these broad grounds, than upon others, which were technical and temporary.

Judgment reversed.

McDONALD J. absent.

27 358
d128 472 DAVID FLANDERS, plaintiff in error, vs. MARY MEATH, by her next friend, defendant in error.

Where a person voluntarily throws themselves in the way of a dray, and an injury ensues, the jury may find almost nominal damages, notwithstanding they should be of the opinion that the driver of the dray was *slightly* more in fault than the party hurt. Notwithstanding the jury may think the person injured altogether in fault; yet, if from pity, or any other consideration, they should return a verdict for damages, and the defendant acquiesce in it, the plaintiff cannot complain, and demand a new trial.

Case, from Bibb county. Tried before Judge LAMAR, June, 1858.

This was an action on the case by Mary Meath, by her next friend, Darby Meath, against David Flanders, to re-

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cover damages for injuries received by plaintiff from the dray of defendant, in the streets of Macon; said dray, at the time, being driven by a negro belonging to, and in the employment of defendant. The damages were laid at five thousand dollars.

The defendant pleaded the general issue.

The following was the evidence, in substance, offered on the trial.

Plaintiff herself was presented to the view of the jury, and the injuries upon her head exhibited.

William Dillard, swore, that he was standing on the side-walk, near the house of Darby Meath, the father of plaintiff. Plaintiff started to run across the street, when a dray, drawn by two mules, and driven by a negro man, was coming down the street at a very rapid rate; the mules, dray and driver were reputed to belong to the defendant—have seen him control them; the mules were the fastest pair about the city, and were going at their best speed, in a trot. The plaintiff ran about 49 feet, and just cleared the heads of the mules, and was caught in the hind wheel of the dray, which ran over her body and head; the driver rather struck his mules with the lines the moment after plaintiff was run over, and went on to the bridge, some 120 to 150 yards, before making any halt. Witness picked plaintiff up, and found her head badly lacerated, and cut from the top over her face, down to the lower part of her cheek; the whole side of her face and ear appeared to be loose, and torn from the skull.

Cross-examined : Plaintiff is a very wild and awkward child, in the habit of running in the streets—have seen her run in front of vehicles just as they were passing, and came near being run over—have told her parents that she would some day get hurt, if they did not keep her out of the street; told them of her running in front of passing vehicles. There was a school just opposite the house of Mr. Meath, to which plaintiff was going; the driver was in the

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habit of passing that street every day; the children in the neighborhood were in the habit of playing in that street, in front of the school house. There was a rain coming up at the time; it was raining in sight; there was a sack of flour and a sack of meal on the dray at the time. After running over the plaintiff, the driver did not look around, but kept on until he reached the bridge, before slackening his pace; the negroes on the dray were in the habit of driving unusually fast, and were frequently dancing and singing on the dray, as it was in motion.

Dominick Garaughty sworn, testified that he saw plaintiff soon after the injury; she was badly hurt; her head was badly cut, from the top to the lower part of her cheek; the physician was then dressing the wounds; she was also much injured on her thighs; since the injury, she has not been as she was before; she has become more stupid and self-willed, and her parents cannot exercise authority over her; she will never, in witness' opinion, be as she was before; saw the place where the injury was done; there was a hole like a hen's-nest, made by plaintiff's head, in the ground; have known plaintiff from her cradle; she was a bright child, but willful and uncontrollable; she was wild before, but is wilder still.

Cross-examined: The children in the neighborhood were in the habit of playing in the street, and witness has seen plaintiff running about the street, when vehicles were passing, and her parents knew it.

Re-examined: Has known plaintiff to suffer, and cry out, in agony, complaining of pain in her ear and head, since the wounds have healed. When witness first saw her, after she was injured, her ear was loose and almost severed from her head.

Here plaintiff closed, and defendant introduced no evidence.

When the plaintiff was exhibited to the Court and jury, there appeared a large rough scar, from the crown of her

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head, down near the lower part of the right cheek, from a half to three quarters of an inch wide.

The jury found for the plaintiff fifty dollars, whereupon, plaintiff moved for a new trial, on the following grounds:

1st. Because the damages found by the verdict are inadequate to the injuries sustained.

2d. Because the verdict is against the evidence, and against the weight of evidence.

3d. Because the verdict is against law, and the charge of the Court.

4th. Because the verdict shows caprice, partiality and perverseness on the part of the jury.

Before argument on the motion for a new trial, defendant offered to file the affidavit of Doctor Lightfoot, the physician in attendance upon plaintiff, when she was injured, that the mind of plaintiff was not injured, that it was as good as it ever was. The Court refused to hear said affidavit, or allow it to be filed.

Counsel for defendant then inquired of plaintiff's counsel, upon what ground they claimed a new trial, who replied, on account of the smallness of the damages.

The Court, after argument, granted the motion for a new trial, and defendant excepted.

STUBBS & HILL; and Wm. T. MASSEY, for plaintiff in error.

POE & GRIER, *contra*.

By the Court.—LUMPKIN, J. delivering the opinion.

It is said that the verdict in this case, cannot be justified on legal principles, and so the presiding Judge seemed to think. That if the jury found for the plaintiff, they were bound to find a larger sum. Is this so?

There was a principle referred to in the case of the Wynn girl, against the Macon and Western Rail Road Co., decided at the July Term, 1858, of this Court, at this place, which

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we hold to be sound law—although, we did not think it applied to the facts of that case, where both parties are in fault, but the defendant most so; the fault of the plaintiff may go in mitigation of damages. Suppose the jury, in this case, came to the conclusion that both parties were in fault, but the defendant *slightly* more so, so as to give the plaintiff a cause of action; in such case, but small damages would be awarded. This obvious rule seems to have been overlooked by Lord Campbell, in a recent trial in England, if the newspaper report of it be reliable, who, because a jury returned a verdict of one farthing damages, and adhered to it, reminded them of the ancient privilege of the Court, to keep them confined till the end of the Term, and then cart them to the boundary line of the county, and have them tumbled into a ditch.

We doubt not, however, that the jury thought of this transaction as we do; that the fault was wholly on the part of this wild and wayward girl. A heavy rain was impending, and the dray of the defendant having flour and meal on board, was hurrying at a rapid trot, to escape. The street was some two hundred feet wide. The little girl ran out forty-nine feet from the side-walk; passed in front of the dray, just clearing the heads of the mules; the movement was voluntary and intentional; it was in proof by the plaintiff's own witnesses, (the defendant introduced none,) that she was in the habit of doing these things; that the fact had been communicated to her parents, and they had been warned, that if they did not restrain her, she would be hurt; the next that was seen of her she was down between the front and hind wheels of the dray, on the opposite side from the one from which she approached the vehicle; and the hind wheel ran over her, inflicting a considerable injury upon her head and body; how she came there does not appear; whether she was attempting to get into the dray, or swing to it, or what, we cannot tell.

Can persons throw themselves across a rail-road track,

Oliver vs. Ross.

or under a dray, and expect to recover, because they are hurt? Still the jury saw fit to give \$50, and the defendant acquiesces. Can the other side complain for getting more than they are entitled to?

The conduct of children must be controlled; the failure to do this, is the curse and ruin of this country, and if parents will not do it, it is a misfortune that the lesson has to be enforced by such catastrophes as the present.

Judgment reversed.

PERRY H. OLIVER, plaintiff in error, vs. **WILLIAM A. Ross**, defendant in error.

The plaintiff in entering up judgment against the defendant, an endorser of a note, omitted to describe the contract of endorsement, and the defendant made the omission the ground of an affidavit of illegality, on the hearing of which, the Court allowed the judgment to be amended.

Held, That this was right.

Illegality, in Sumter Superior Court. Decision by Judge **ALLEN**, at September Term, 1858.

William A. Ross brought an action, under the Jones Form, against Perry H. Oliver, as endorser of a promissory note. He recovered judgment upon which an execution issued and was levied upon certain property belonging to defendant, who interposed by affidavit of illegality, on the ground, that the judgment entered up did not designate and identify the contract sued on, as required by law, and that

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execution issued accordingly; defendant being sued separately as endorser.

Upon the case being called, the plaintiff moved to amend the judgment, making it conform to and designate the contract.

The Court granted the motion, allowing the amendment to be made, and counsel for defendant excepted.

McCAY & HAWKINS, for plaintiff in error.

WORRILL & HAWKINS, *contra*.

By the Court.—BENNING, J. delivering the opinion.

That the judgment was amendable, we are satisfied. 24 Ga., 167. *Mayo vs. Kersey*.

It was said, that an amendment of the judgment, would affect the surety on the illegality bond. But what if it would? It must be presumed, that he knew the law of amendment, and contracted in reference to it. Besides, he is no party here, and, for ought that appears, he may never have occasion to be a party any where. If the principal in the bond, produces the property according to the condition of the bond, and it is to be presumed that every man will observe his obligations, the bond will be satisfied, and the surety never have a cause of complaint.

Judgment affirmed.

MCDONALD J. absent.

Outlaw vs. Gilmer.

MESHECK B. OUTLAW, plaintiff in error, vs. JOHN H. GILMER, defendant in error.

The Court has no authority to make the Sheriff, special bail in Trover, founded on the Act of 1821.

Bail Trover, in Lee Superior Court. Decision by Judge ALLEN, at September Term, 1858.

Outlaw brought his action of trover against Gilmer, for two negro slaves, returnable to the Superior Court of Lee county, to be held on the fourth Monday in September, 1858. The statutory affidavit for holding the defendant to bail was made and filed, and the papers placed in the hands of the Sheriff.

At the Term of the Court to which the writ was returnable, the plaintiff took a *rule nisi* against the Sheriff, to show cause why he should not be made and held special bail in the case; the rule reciting that he had failed to take bond and security of the defendant as required by law.

The Sheriff answered, that he arrested [the defendant on the 10th day of September, and detained him in custody until the 17th, when the jail fees not being paid or secured by the plaintiff, who resided out of the county, the defendant was discharged from custody by the Justices of the Inferior Court. That defendant was now in the county, and had been in attendance upon the Court, and that respondent is ready to rearrest him if the Court shall order, &c.

Upon this return of the Sheriff, the Court refused to make the rule absolute, and counsel for plaintiff excepted.

VASON & DAVIS; McCAY & HAWKINS, for plaintiff in error.

WARREN & WARREN, contra.

McDaniel vs. Truluck.

By the Court.—BENNING J. delivering the opinion.

The action was founded on the second section of the Act of 1821, “to quiet and protect the possession of personal property, and to prevent taking possession by fraud or violence;” (*Pr. Dig.* 449;) and there is nothing in that Act, authorizing the making of the Sheriff, special bail, in any case. There is nothing in any statute, or in the common law, so far as we know, that authorizes the making of the Sheriff, special bail in such a case as the present; a case in trover, and, in trover under the Act of 1821.

The Judiciary Act provides for the making of the Sheriff special bail, in the cases of bail which it authorizes, but those cases are cases of contract, not, cases of trover.

For aught that we can see, then, the Court below was right, in discharging the *rule nisi*, against the Sheriff. But it is not to be inferred from this, that we think the Sheriff, not liable in any form. What we may think on that question will be expressed when it comes up.

Judgment affirmed.

McDONALD J. absent.

27 366
127 437

WILLIAM McDANIEL, plaintiff in error, vs. NORREL TRULUCK,
defendant in error.

Entries, in a merchant's book, made by himself, may be proved by his books, notwithstanding he keeps a clerk who charges a portion of the items in the account.

Complaint, in Dooly Superior Court. Before Judge L. A. MAR. October Term, 1858.

McDaniel vs. Truluck.

The facts of this case are sufficiently stated in the opinion of the Court.

T. H. DAWSON, by B. HILL, for plaintiff in error.

COLDING, *contra*.

By the Court.—LUMPKIN, J. delivering the opinion.

Truluck sued McDaniel on his store account; the original book of entries as put in evidence. It appeared that the items in the defendant's account were partly charged by the plaintiff, partly by the clerk, who testified in the case; and a few items, amounting to between two and three dollars by another clerk; these were stricken out. Davis, the witness, swore to the sale and delivery of the items charged by himself; that the rest were in the hand-writing of Truluck, made along during the year; plaintiff proved that he kept correct books; one of the witnesses thought his prices pretty high, but he charged every body alike, and this was the plaintiff's case. Defendant objected to the books going in evidence; contending that if the plaintiff kept a clerk, that the shop-keeper's entries could not be proved by the books.

Our practice is so well settled in this State, that we will not disturb it. If all the entries are in the hand-writing of the merchant, it is not disputed, but that he may prove his account by his books. Why not if part only? Here are the entries charged by Truluck, interspersed along through the year, with the entries made by the clerk; to my mind they carry a stronger presumption of fairness, than if all were charged by the plaintiff.

A contrary rule would compel a store-keeper, if he kept a clerk a part of the time, to incur the unnecessary and burdensome expense of doing so all the time; and that is not all, the clerk must be book-keeper, and make all the entries, although employed perhaps, mainly as a salesman, or to do the drudgery of the work. Nay, more than this;

Davis, ex'or, &c. vs. Maxwell.

he must never be absent, but attend all the time to charge the sales made by his employer, and even this is but second-hand or hearsay evidence. It is absurd in every point of view ; for the shop-keeper, when he dispatches his clerk to his meals, or in the country, to liquidate an account, or collect a debt, that he should make a memorandum of his transactions in the interval, to be transferred by the clerk to the book, on his return. How does he know that his principal sold and delivered the goods?

Judgment affirmed.

^{27 308}
^{125 381} JONATHAN DAVIS, ex'or, &c., plaintiff in error, vs. WILLIAM A. MAXWELL, et al, defendants in error.

An arbitration proceeding under the common law, is revocable by either party to it, at any time before the award.

Application for mandamus, in Lee Superior Court. Decision by Judge ALLEN, at chambers, December 11th, 1858.

This was an application, by the plaintiff in error, to the Judge of the Superior Courts of the South-Western Circuit, for a mandamus to be directed to the defendants in error, as arbitrators, requiring them to set as a Court, and pass upon the following submission :

“GEORGIA, LEE COUNTY.—Articles of agreement made and entered into, this 25th day of August, 1858, between Samuel Lindsey and Jonathan Davis, as executor of Elbert

Davis, ex'or, &c. vs. Maxwell.

Heisler, deceased, both of said county. Whereas, certain disputes exist between the said parties, arising between the parties, with reference to certain mutual debts and liabilities, alleged to have existed between the said Samuel Lindsey, and the said Elbert Heisler, in his lifetime, and which it is alleged have never been settled, liquidated, or otherwise disposed of, or arranged. For the purpose of satisfactorily adjusting such differences, it is agreed by the said parties that the matters in dispute between them, touching said mutual liabilities and debts, be submitted to William A. Maxwell and Edward V. Monroe, both of said county, as arbitrators; that the said arbitrators be empowered, at any day they may choose, after the signing and sealing of these presents, and after selecting an umpire, to meet for the purpose of arbitrating and passing upon said points in dispute, giving at least three days notice, in writing, to each of said parties, of the day and place of such meeting; that it shall be competent for such arbitrators at such meeting, to examine any evidence that may be offered to them by either party, or their attorneys, in such a manner as may seem to them most conducive to justice in relation to said matters in dispute; the said parties themselves not to be sworn as witnesses, nor give in any testimony during the progress of said arbitration; and after hearing all the testimony, the said arbitrators and the said umpire may, and shall proceed to make up their award in writing, signed and sealed, which said award shall be made final and conclusive forever upon the said parties, in regard to the matters in dispute, as above stated; that it shall be the duty of the party in whose behalf the said award shall be made, to demand compliance with, and a performance of, the same in writing, at least thirty days before instituting suit upon the award so made, or upon this agreement. It is further agreed, that this agreement be delivered to said arbitrators, to be by them delivered, together with the award by them made, to the next Superior Court for said county. In witness whereof, we have

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hereunto set our hands and seals, the day and year above
and before written.

(Signed)

SAMUEL LINDSEY, (L. s.)
JONATHAN DAVIS, (L. s.)

Executor on the estate of Elbert Heisler, deceased.

Signed and sealed in the presence of

KITRELL J. WARREN, N. P., for Lee county.

The arbitrators named in the foregoing submission, selected Samuel C. Wyche as umpire; and they, and the said Wyche, having been sworn in conformity to the arbitrators Act of 1856, postponed the hearing of the case, until the 8th day of October, 1858. When the arbitrators met in pursuance to their adjournment, Samuel Lindsey, by his attorneys, stated his intention to withdraw from the submission, on the ground, that the proceeding was not in conformity to the statute of the State of Georgia regulating arbitrations; and that Jonathan Davis had no authority, outside of said statute, to submit the rights of his *cestui que trusts* to arbitration. The arbitrators decided to allow the withdrawal of Lindsey, and to dismiss the whole proceeding from their consideration, unless the articles of submission were so amended as to conform to the aforesaid statute. Counsel for Davis refused to amend, and sued out a mandamus, to compel said arbitrators to sit as a Court, and pass upon said submission.

The motion for mandamus, was by consent of the parties, heard before Judge Allen, at chambers, in Albany, and was by him refused; and counsel for Davis excepted.

McCAY & HAWKINS, for plaintiff in error.

VASON & DAVIS, *contra*.

By the Court.—BENNING J. delivering the opinion.

Was the Court right, in refusing the mandamus?

Davis, ex'or, &c. vs. Maxwell.

It is certain, that the Court was right, if Lindsey had the power to revoke the submission; or, if mandamus does not lie, to compel arbitrators to act.

Lindsey had the right to revoke the submission, if the case was an arbitration governed by the common law, and, not one governed by the arbitration Act of 1856. *Russ. Ark.* 147. And the arbitration was one governed by the common law, for it was not made under the act of 1856. This is apparent from the fact, that the submission disregards that Act, in several important particulars. That act requires, that the submission shall contain, "a clear and accurate statement of the matters in controversy submitted." This submission contains no such statement—it contains no statement at all, of those matters. That Act provides, that each of the parties may be sworn, as a witness; this submission stipulates, that neither party shall be sworn, as a witness. That Act requires, that the award shall be returned to the Superior Court next after the making of it; and, shall be made a judgment of that Court; and be enforced as a judgment of that Court; this submission provides, that the successful party shall, before suing on the award, or on the submission, give thirty days notice to the other party—which provision would be absurd, if the award had already been made a judgment of the Court, to be enforced as a judgment.

The case then being governed by the common law, and, not by the statute of 1856, Lindsey had the right to revoke the submission.

This being so, there was no case for a mandamus, and, therefore, it becomes unnecessary to decide the other question—the question whether mandamus lies to arbitrators. And we do not decide it, but we do say, that we are rather inclined to think, that mandamus does not lie to arbitrators.

Judgment affirmed.

McDONALD J. absent.

Jordan, adm'r vs. Faircloth, &c.

LEONIDAS A. JORDAN, adm'r, plaintiff in error, vs. LESSOMS FAIRCLOTH, &c., defendant in error.

- [1.] Although there may be, at law, a remedy for a person, yet, unless that remedy is a complete one, he may, nevertheless, go into equity.
- [2.] A judgment does not determine a question which, it appears of record, could not have been adjudicated.
- [3.] Although a suit at law terminates in a verdict for the defendant, and not in a nonsuit, a discontinuance, or a dismissal, yet, if the case was such, that a nonsuit was all that the defendant was entitled to, by reason of a decision of the Court, excluding from the jury, the consideration of the plaintiff's title; and, the suit be renewed within six months in equity, the second suit will be held in equity, as within the Act of 1847, and saved from the statute of limitations.
- [4.] An order to answer exceptions to an answer, did not specify a time within which the answer was to be put in.

Held, That the defendant had until the next Term to file his answer in, and, consequently, that, if he died before that Term, there was no right to take the bill for confessed, although he might have died without answering.

In Equity. Decision on demurrer, in Dougherty Superior Court, by Judge ALLEN, at November Term, 1858.

This was a bill in equity, filed by Lessoms Faircloth, in his own right, and as guardian, against Leonidas A. Jordan, administrator of Benjamin S. Jordan, deceased.

The bill states, that at the —— Term of Baker Superior Court, he commenced his action against Benjamin S. Jordan, of Baldwin county, for the recovery of lot of land No. 316, in the 2d district of then Baker, but now Dougherty county, and at the May Term, 1855, the same came on to be tried, and a verdict was rendered for the defendant, Jordan.

The bill further states, that the said lot of land was drawn by one John H. Baugh, of Madison county, at the time, but now of the county of Newton. That on the 10th January, 1834, Baugh executed a deed to said lot to one John Carmichael; that Carmichael conveyed said lot to Green L. Dennard, by deed dated 20th July, 1834; that Dennard conveyed to Reddin Faircloth, by deed dated 10th October, 1836; that

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on the 17th January, 1837, Reddin Faircloth conveyed said lot to Thomas Starling; and on the 17th October, 1837, Starling conveyed the same to complainant, and one Shadrick Faircloth, now deceased, and for whose minor children complainant is guardian; all of which deeds of conveyance are in the possession of complainant, and under which he claims title to said land.

The bill further states, that upon the trial of said action at law, Jordan offered in evidence a plat and grant from the State of Georgia to said Baugh, for said lot of land, bearing date long after the date of Baugh's deed to Carmichael; then a deed from Baugh to one Giles Tompkins, of Putnam county, and a deed from John Tompkins, then of Baker county, but now deceased, to said Jordan, said John claiming said lot, under and by virtue of the last will and testament of Giles Tompkins, deceased.

The bill further states, that one of the matters in issue upon said trial at law, was the execution of the deed by Baugh to Carmichael; and upon that issue the jury found that said deed was genuine, and executed by Baugh, but they nevertheless found a verdict for the defendant, Jordan, upon the ground, that at the time of the execution of said deed to Carmichael, the grant fees were unpaid, and the deed consequently void. That in order to make Baugh a competent witness upon the trial of the action at law, Jordan executed to him a release from all liability on the covenant of warranty contained in the deed, which release also discharged all the intermediate warrantors.

The bill further states, that complainant's claim to said land is older than Jordan's, and that he and both the Tompkinses had notice of his title before they or any of them purchased the same.

The bill further states, that complainant, by bill of exceptions, carried said case, decided at law against him, to the Supreme Court of the State of Georgia, which Court affirmed the judgment of the Court below, holding that complainant's

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only remedy was in a Court of Equity, and he therefore files this his bill.

The bill further states, that Jordan well knew all the facts connected with complainant's title, before he purchased of Tompkins, and he refused at first to buy said land, until John Tompkins undertook to remove, or to take up the outstanding title of complainant; that Tompkins being very desirous of owning a lot of land belonging to Jordan, called the "Blue Spring" tract, defendant offered to let him have said place if he would get lot No. 316 for him, as that lot is situated directly opposite Jordan's gate, and he was anxious to get it, but at a less sum or price than that put upon it by complainant, and it was concerted amongst them, that Giles Tompkins was to buy the land from Baugh, for his son John Tompkins, who would make the trade aforesaid with Jordan ; that in pursuance of said arrangement, Giles Tompkins procured a deed from Baugh ; and the Tompkinses and Jordan, at and before their purchases aforesaid, had full notice of complainant's claim and title, and that said purchase thus made by Jordan, was a fraud upon his rights.

The bill charges, that said Jordan has been in possession of said land since 1850, and that the rents thereof now amount to the sum of two thousand dollars, which he should account for.

The bill charges, that the equity of the case rests upon the notice received by Jordan and the Tompkinses of the title of complainant, and alleges that the Court, on the trial at law, refused to hear this question of notice, and ruled out all testimony on it ; and that in this course the Court was sustained by the Supreme Court ; and therefore, as the bill insists, the complainants are not bound by the verdict at law, and the matters are not adjudicated.

Pending the cause, Benjamin S. Jordan, the defendant, died, and Leonidas A. Jordan was appointed his administrator, and made a party defendant.

Before the death of Benj. S. Jordan, he answered com-

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plainant's bill, to which answer exceptions were filed, three of which were sustained, and defendant ordered to answer over as to the matters therein referred to. No time was appointed within which this answer was to come in. Before Benj. S. Jordan answered over, and before the next Term of the Court, he departed this life, and his administrator answering, his answer was excepted to, but the exceptions are not stated.

Defendant moved to dismiss the bill for want of equity, and the case came before the Judge upon two motions, and exceptions to the answer of the administrator.

1st. A motion by complainant to take the bill *pro confesso*, as to the matters upon which defendant was ordered to answer over.

2d. Motion to dismiss the bill for want of equity.

The Court overruled the motion to dismiss for want of equity, and to which decision defendant excepted.

The Court refused to order the bill to be taken absolutely as confessed against Benjamin S. Jordan, upon the ground, that it appeared by the bill that complainant is not compelled to resort to the conscience of defendant, to obtain a discovery of the matters not answered by Benjamin S. Jordan, and upon which he was required to answer over. To which decision complainant excepted.

The Court further overruled the exceptions filed to the answer of Leonidas A. Jordan, administrator, upon the ground, that said answer is as full as said defendant could make it. To which decision, complainant also excepted.

VASON & DAVIS, for the defendant, Jordan.

E. H. PLATT, for complainants in the bill.

By the Court.—BENNING, J. delivering the opinion.

The Court below overruled the motion to dismiss the bill

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for want of equity. The first question, therefore, is, whether there was equity in the bill?

The grounds of the motion, as urged here, were three.

1. That the title of the complainants, if they had any, was a title they might assert at law.

2. That what was relied on by the complainants' as title, was no title, either at law or in equity, because it had once been asserted at law, and been adjudged there, to be no title.

3. That if it had ever been a title, it was now barred by the statute of limitations.

As to the first of these grounds :

[1.] The title of the complainants against the defendant, was, taking, as we must, the bill to be true, what is called, a complete equity. And it is true, that, according to the later decisions of this Court, a complete equity is sufficient to support an action at law—an ejectment. *Goodson vs. Beacham*, (24 Ga, 153,) is one of these decisions, and there are some others. But none of these decisions go so far as to say, that the remedy at law, on such a title, is complete and adequate. Nor is it, generally; for, in almost every case in which, the title is only equitable, the owner of the title, has the right to have, not only possession of the land, but a conveyance of the legal title. This conveyance he cannot obtain at law, but only in equity.

And, in the present case, the complainants if entitled to the land, are entitled to have a conveyance of it, made to them, by Jordan.

This first ground, then, we think, not good.

As to the second ground : .

[2.] It is true, that what is relied on in this bill for title was once relied on in an action at law, brought for the land by the complainants; but, it is not true, that it was, in that action, passed upon, and adjudged to be no title. The main thing relied on in both suits, to make out the title of the plaintiffs, is, *notice*—notice of the title of the Faircloths, had by Jordan and the Tompkinses, when they purchased. But,

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in the suit at law, the question of this notice to them, was, expressly, excluded from the consideration of the jury. This appears of record. Of course, therefore, the title that depended on that notice, could not have been adjudicated by the Court and jury, in that suit.

As to the third ground :

[3.] The present suit in equity, was commenced within less than six months from the termination of the suit at law. The termination of that suit was, it is true, not by "nonsuit," "discontinuance" or "dismissal." And therefore the case does not fall within the very letter of the Act of 1847. *Cobb, 569.* The case terminated by a verdict for Jordan, but, then, the reason of that, was, that the Court excluded from the jury, the consideration of the equitable title of the Faircloths, and excluded all evidence of that title. The Court having done this, the case was left in a condition in which, Jordan was entitled to a nonsuit, and to no more than a nonsuit. A Court of Equity, therefore, which, if possible goes by substance and not by form, will regard the verdict as amounting, in reference to the Act of 1847, to no more than a nonsuit; and, consequently, will regard the renewal of the suit within six months from the verdict, as a substantial compliance with that Act.

So, we think, that there was no validity in this the third and last ground. And thus we think that none of these grounds were sufficient to show that there was no equity in the bill. And we know of none ourselves that is sufficient to show that. Therefore we see no error in the judgment overruling the motion.

The next question is, as to the refusal of the Court to let the bill be taken as confessed in the parts which, Jordan, on exceptions to his answer, was required to answer over.

[4.] The order to answer over, did not set a time within which, the answer was to be filed. We think, therefore, that Jordan had until the next Term within which, to answer. Before the next Term, he died. Jordan, then, never having

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been in contempt, there could be no ground for taking the bill as confessed by him.

We think, then, that the Court was also right, on this question.

The next and last question is, as to the sufficiency of the exceptions to the answer of the administrator of Jordan.

These exceptions are not to be found in the record. So we cannot decide the question.

Judgment affirmed.

MCDONALD J. absent.

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Seaborn C. Bryan, plaintiff in error, vs. Samuel Gurr,
defendant in error.

- [1.] Under the Judiciary Act of 1790, every defendant is entitled to state his defense plainly, fully and distinctly, according to the truth of the case without being required to spread a falsehood upon the record under the pain of being entrapped by technical rules.
- [2.] In an action of slander, the plea of justification puts the plaintiff's general character in issue.
- [3.] When the plea of justification has been filed, and is not demurred to for insufficiency, and evidence has been admitted under it without objection, it is error in the Court, *sua sponte*, in its charge to the jury, to instruct them, that the plea is defective, and the defendant can take nothing by it.

Slander, from Houston county. Tried before Judge LAMAR,
at September Term, 1858.

This was an action for slander, brought by Samuel Gurr against Seaborn C. Bryan. The slanderous words alleged to have been spoken by the defendant, were, that plaintiff had sworn falsely in a certain suit, which had been tried in

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Houston Superior Court, at April Term, 1853, wherein Hughes Walton, administrator of Joseph Nunery was plaintiff, and the said Seaborn C. Bryan was defendant, being an action of trover for certain negroes.

The defendant pleaded:

1st. The general issue, not guilty.

2d. That the words alleged to have been spoken, were true, and that defendant was justifiable in speaking the same.

. 3d. That the words were not spoken maliciously, but because defendant believed that they were true, having understood Gurr, in said action, to swear that defendant "told him to go and tell Fuller to leave the place where he was then staying and working." That he, defendant had never so told said plaintiff, and that it was in reference to this testimony of plaintiff's on said trial, that defendant, had said that plaintiff swore falsely, but that he did not utter said words maliciously, but from a confident belief, that plaintiff had so testified, and knowing that he had never so told plaintiff.

The case was submitted to the jury upon the evidence of both parties, and after argument and the charge of the Court, the jury found for plaintiff one thousand dollars.

Whereupon, defendant moved for a new trial, upon ten grounds, which it is unnecessary to set out here, as the opinion pronounced by the Supreme Court, is confined principally to the ninth ground, which is as follows:

9th. "That the Court erred in admitting evidence of plaintiff's general good character, under the plea, as it was alleged, of justification, and yet charged the jury that the defendant, in order to make this plea available, should have set forth and proved what the plaintiff had sworn, and that it was upon a point material in the case. And further charged that such averment and proof were material in the case. The Court thus giving an effect and character to the plea which plaintiff's counsel had not assumed or contended for, and thereby depriving defendant of all benefit or advantage of

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said plea of justification, while plaintiff had the full benefit of all his evidence under the same."

The Court refused the motion for a new trial, on each and all the grounds taken, and defendant excepted to said decision, and assigns the same as error.

This case was tried before Judge POWERS, but the motion for a new trial was heard and determined by Judge LAMAR.

WARREN & HUMPHRIES; WILLIAM H. ROBINSON, for plaintiff in error.

SCARBOROUGH; and KILLEN, *contra*.

By the Court.—LUMPKIN J. delivering the opinion.

For myself, I find no great fault with the special plea and the charge asked on it. It might have been better worded perhaps, so as to have set forth truly the facts on which the defendant relies. Admitting the speaking of the words, which is not denied, the defendant should have set forth in his plea, that being present in Court, when the plaintiff was examined as a witness in the case of _____ he understood him to say, as did Bailey, Humphries, Giles, Hall, and others, that he, the defendant, had requested him, witness, to tell Fuller to move off of his land. And so understanding him, and knowing that he had given no such instructions, he said to by-standers at the time, and to Gurr himself afterwards, that he had sworn falsely. That he did not speak the words maliciously, but to repel what he believed at the time to be a false statement, highly injurious to himself and prejudicial to his rights, and that he had not repeated the accusation, after its denial by the plaintiff. Of the truth of all which he put himself upon the country, &c

[1.] Every defendant under our system of pleading is entitled to answer according to the truth of his case, without regard to technical rules. And to avail himself of this priv-

ilege, he is not bound to spread a lie upon the record. Amongst other things, the Judiciary Act of 1799, was intended to do away with this demoralizing system of the common law.

[2.] The rule as to affirmative and negative testimony, does not apply in this case. This is the case where six men are in a room, and three swear that the clock struck 12, and the other three that it struck 11, all of them having their attention directed to the clock at the time. One set here, swear that Gurr said Bryan told him, the other that Riddle told him, and all equally credible. One is wrong, but which we cannot decide. It is no doubt an honest misunderstanding. The witness may have repeated the statement one time, using the name of Bryan and the other Riddle, through inadvertence. All men are liable to this confusion. Counsel are guilty of it in arguing, and Judges in deliving opinions. The misnomer is allowed to go uncorrected as the listeners understand what the speaker intended to say.

As to the truisms contained in several of the requests to charge, we deem it unnecessary to notice them. They had no special application to the facts of this case.

[3.] There was no error in the Court in admitting testimony in favor of the general character of the plaintiff, the same having been put in issue by the plea of justification filed by the defendant, or at least what was intended as such by the defendant, and so understood and treated by counsel on both sides, and by the Court during the process of the trial. It was not demurred to for informality or insufficiency. The Court, however, in its charge to the jury, stated that to make the plea of justification available, it should have set forth what it was the plaintiff had sworn to, which the defendant charged to be false; and that the fact stated was material to the issue in the case in which Gurr was sworn, and wherein it was material. And that these necessary averments must be proved.

By this unexpected and uncalled for charge, the Court de-

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prived the defendant of the whole benefit of his defence. We are not called on to decide whether the charge was right or wrong. The plea of justification had been attempted to be put in, confessing the speaking of the words charged in the declaration, and alleging their truth. It was not objected to. It was treated as a good plea. The Court could not be justified in hearing evidence as to the plaintiff's general character upon any other ground. Then at the close of the case, without solicitation from plaintiff's counsel, to have given this charge, was manifest error. The dilemma is palpable. This instruction was wrong, else the Judge was in error in admitting the evidence of Edgeworth, McGehee, Tollen, Miller, and others, in support of Gurr's general character, when the same had not been impeached by the plea of justification.

Judgment reversed.

WILLIS J. BONE, for plaintiff in error, vs. WILLIAM INGRAM,
defendant in error.

[1.] The defendant asked leave to re-introduce a witness, his counsel stating, that he could prove a material fact by the witness—a thing that he did not know of, when the witness was first examined. The plaintiff's counsel "objected to the witness being recalled." The Court sustained the objection.
Held, That the Court erred.

[2.] A witness of the plaintiff's, swore, that a third person had made a material statement to him. Afterwards, both parties closed their evidence, and the Court adjourned until next morning. Before the argument commenced the next morning, the defendant's counsel asked leave to examine this third person, himself—stating, that such person would contradict the witness; that he was out of the county, the evening before, when the evidence was closed; and, that the defendant was ready to swear, that he did not anticipate, that the witness would testify to any such matter.
Held, That the Court ought to have granted the leave asked for.

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Complaint, in Randolph Superior Court. Tried before Judge KIDDOW, at May adjourned Term, 1858.

This was an action by William Ingram against Willis J. Bone, on a promissory note for \$200, payable to James R. Gause, or bearer, dated 8th November, 1853, due 1st January, 1857.

After several witnesses had been sworn, and examined on the part of the defence, defendant's counsel proposed to recall Ramsay, a witness, who had been examined; counsel stating that he had just learned that he could prove a material fact by the witness, which he did not know, when the witness was on the stand. Plaintiff's counsel objected to the witness being recalled. The Court sustained the objection, and defendant excepted.

The plaintiff in reply, proved by a witness named Bridges, that six or eight months after defendant bought the mule, (for which the note sued on was given,) he, at the request of William W. Massey, went to buy the mule; that Massey authorized him to give one hundred and seventy-five dollars, that he offered defendant one hundred and eighty dollars, which he refused to take.

After the cross-examination of this witness, the testimony closed, and the Court adjourned till the next morning.

Upon the opening of Court next day, the defendant proposed to re-open the case, so far as to allow him to introduce and examine the said William W. Massey, by whom he would prove, that said Bridges was never sent or authorized by him to buy said mule; that he Massey, did not consider the mule worth twenty-five dollars. Defendant further proposed to make affidavit that he did not anticipate the testimony of said Bridges; that when his counsel announced the evening before, that he had closed, Massey was not in the county, but was in Webster county, where he resided; that he, defendant, had gone after him during the night, and had him then in Court, ready to be sworn. The Court re-

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fused the application to re-open and allow defendant to examine the witness, and defendant excepted.

The jury found for the plaintiff, and defendant tendered his bill of exceptions, assigning as errors the foregoing rulings and decisions.

GEO. L. BARRY, for plaintiff in error.

DOUGLASS & DOUGLASS, *contra*.

By the Court.—BENNING J. delivering the opinion.

We think, that the Court below erred, in not allowing the witness, Ramsay, to be recalled, and, the question to be put to him. The excuse for not putting it, at first, was quite sufficient.

This was not denied; but it was said, that what was to be proved by Ramsay, does not appear—and, therefore, that the presumption must be, that it was something immaterial. But we think not. We think, the presumption must be the other way. For, the statement to the Court, by the counsel moving for the reintroduction of the witness, was, that he could prove “a material fact”—by the witness ; and no issue or question, as to whether this statement was true in fact, was suggested by the Court, or by the counsel on the other side. The counsel merely “objected to the witness being recalled;” they did not object, that what he would say, if recalled would be immaterial.

Besides, when the intention is to rely, or to decide, on a special ground like this, the intention ought to be stated, in the objection, or, in the decision, respectively. Otherwise, it will be considered as having been waived—for the ground of such an objection, might perhaps be removed in a moment, if the objection were known. In the present case, all that was necessary to be done, to remove or to establish this objection, was, simply, to ask the counsel to state the fact which he expected to prove.

MACON, JANUARY TERM, 1859.

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[1.] We think, then, that the Court erred in not allowing the recall and re-examination of the witness.

We think too, that the Court ought to have opened the case, and have let in the testimony of the witness, Massey. That that testimony was material is unquestionable; it was not denied. And the excuse for not having it sooner, was ample; unless the law requires, of parties, impossibilities.

Judgment reversed.

McDONALD, J. absent.

PETER SOLOMON, claimant, plaintiff in error, vs. OVID G. SPARKS, plaintiff in *fi. fa.*, and WILLIS S. BREAZEAL, defendant in *fi. fa.*, defendants in error.

A mortgage deed is not within the Act of 1818, to prevent persons unable to pay their debts, from assigning their property, "*in trust*" for some of their creditors, in preference to others.

Claim, in Bibb Superior Court. Tried before Judge LAMAR, at November Term, 1858.

This was a claim interposed by Peter Solomon, to certain lands levied upon by the Sheriff of Bibb county, under and by virtue of a mortgage *fi. fa.*, issued from the Superior Court of said county, at the suit of Ovid G. Sparks, the mortgagee, against Willis S. Breazeal, the mortgagor.

Solomon claimed the lands under a former purchase at Sheriff's sale, made under general judgments and executions against Breazeal.

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The issue was made up and submitted to the jury.

Plaintiff offered in evidence his mortgage deed, dated 22d July, 1854, which, after reciting that Breazeal was indebted to Mrs. Sparks, his daughter, and the wife of plaintiff, on account of the use and hire of her property and negroes, the sum of \$7,580 00; and that Sparks, to relieve and assist Breazeal, had agreed to assume and pay a large amount and number of debts (describing them,) due by him, Breazeal, conveys to Sparks, not only all the lands levied upon by the Sheriff, but likewise ten mules, two horses, twenty head of cattle, sixty head of hogs, plantation tools of all kinds, and two wagons and gear belonging to said plantation, and also mortgagor's undivided half interest in twelve mules, the wagons and gear, and other property attached to the mills on said premises, owned jointly by himself and one John T. Brown, upon condition that if the said Breazeal shall, on or before the 1st January, 1855, pay to said Sparks the half of said \$7,580 00, and by the 1st January, 1856, pay the other half, and shall, within six months after the said Sparks shall have paid for him any of the debts enumerated, "or any other debt not now enumerated, and which at the request of said Breazeal he may pay for said Breazeal," refund the same, then said mortgage conveyance to be null and void, else to remain in full force.

The plaintiff in the mortgage *fi. fa.* then offered in evidence the record and proceedings of foreclosure of said mortgage, in Bibb Superior Court. The *fi. fa.* dated 1st January, 1857, for \$12,068 00 principal, and \$973 24 interest to 24th November, 1856.

Plaintiff then proved by *John T. Brown*, that at the date of the mortgage, Breazeal was in possession of the mortgaged premises; that in 1854, Sparks and Breazeal referred to him, as a mutual friend, to estimate and award the annual hire of the negroes belonging to Mrs. Sparks, while in his, Breazeal's, possession, from the death of her mother to the time of her marriage with Sparks; that he knew the negroes well,

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and their value, and he estimated their value for this period at \$7,500 00 ; that in his estimate he did not charge Breazeal with interest on the hire ; if he had done so, it would have amounted to \$12,000 00 . The negroes were given to Mrs. Breazeal by her father, Mr. Jones, by deed of gift, for and during her life, and at her death, to her child or children ; that Mrs. Sparks was the only child ; that the deed was on record in Burke county, and was destroyed by the burning of the court-house there ; Mrs. Breazeal had been dead some years. [The mortgage recites that she died in 1843.—REP.]

Cross-examined.—He only knew of the indebtedness of Breazeal to Sparks from the parties themselves ; Sparks married Breazeal's daughter ; the mortgage included all the property Breazeal had, except some household furniture and about 13 negroes, which he had mortgaged to his brother, to indemnify him on a security debt of \$6,000 00 . At the time the mortgage to Sparks was executed, (July, 1854,) Breazeal was unable to pay his debts ; he was sued, and suits were pending against him ; supposes Breazeal supported and educated his daughter from the death of her mother till her marriage ; that the amount of interest on the hire of the negroes would have supported and educated her. Plaintiff here closed.

Claimant proved by *Robert B. Barfield*, that at the time said mortgage was executed, Breazeal was largely indebted ; that executions amounting to several thousand dollars, were in his hands, as Deputy Sheriff, against him, in the year 1856, which he returned unsatisfied ; that some suits were pending on some of these cases in July, 1854 ; that he was present when the land now in controversy was sold by the Sheriff ; was bought by Peter Solomon, the claimant ; that notice was given at the sale of Sparks's mortgage.

Claimant then offered and read in evidence, the Sheriff's deed to him for the same premises contained in the mortgage, dated 6th November, 1855, executed in pursuance of a levy and sale, under an execution of claimant against said Brea-

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zeal, and Henry E. Moore, amounting to \$900 00. Sale made first Tuesday in November, 1855. Also offered and read in evidence, a declaration in attachment, at the suit of claimant against Breazeal, and Henry E. Moore, filed in office 18th April, 1854, and judgment signed thereon 27th November, 1854, for \$4,640 55 principal, besides interest and cost, and an execution on said judgment, dated 5th January, 1855. Here claimant closed.

1st. Upon the conclusion of the evidence, and after argument by counsel, claimant requested the Court to charge the jury, that the deed introduced in evidence by plaintiff, as a mortgage, was void and of no effect under the Act of 1818, and that the property was not subject to the *f. fa.* issuing upon the foreclosure thereof. The Court refused so to charge, but charged, that the deed was a mortgage, and good and valid if founded upon a *bona fide* debt or debts. To which charge and refusal to charge claimant excepted.

2d. Claimant further requested the Court to charge the jury, that in as much as part of the consideration specified in the mortgage was the payment of debts to be designated by the grantor, that fact is evidence of a trust for his benefit, and the deed is void. Which charge the Court refused to give, and claimant excepted.

3d. Claimant further requested the Court to charge, that the mortgage cannot be good in part and void in part; and if any portion is obnoxious to the Act of 1818, the whole is void. Which charge the Court refused to give, but in lieu of the two last requests, charged the jury, that there was no trust in said mortgage deed, and the same was good and valid if made to secure a *bona fide* debt existing at the time. To which charge and refusals to charge claimant excepted.

The jury found in favor of the lien of the mortgage *f. fa.*, and counsel for claimant tendered their bill of exceptions, assigning as error the charges and refusals to charge above excepted to.

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SPEER & HUNTER, for claimant and plaintiff in error.

JOHN RUTHERFORD, *contra.*

By the Court.—BENNING J. delivering the opinion.

Was the mortgage deed contrary to the Act of 1818, which forbids insolvent debtors, to make preferences among their creditors?

The Act declares, that assignments made by persons unable to pay their debts, “in trust” for the benefit of some of their creditors, in preference to others, shall be fraudulent and void as “against creditors.” *Pr. Dig.* 164.

Is a mortgage deed an assignment “in trust?” If it is not, it is something which is not at all within the Act. This is manifest.

It has been held by this Court, that a mortgage deed is not even a conveyance; that, it is a sort of thing which creates merely a lien. *Davis vs. Anderson*, 1 *Kelly*, 193; *Elfe vs. Cole*, decided at Macon, January, 1858.

If a mortgage deed is not a conveyance at all—not an assignment at all—it cannot be an assignment “in trust,” and therefore, it must be a thing which is not within the Act.

But there are some decisions of the Court, inconsistent with the idea, that a mortgage deed is not a conveyance. *Behn & Foster vs. Phillips*, 18 *Ga.* 466; *Knowles vs. Lawton*, *Id.* 476. And in my individual opinion, a mortgage is a conveyance. See my opinion in *Elfe vs. Cole*, *supra*.

Conceding, then, for the sake of the argument, that a mortgage is a conveyance, is it a conveyance “in trust?” And the answer must be in the negative. The estate created by a deed of mortgage, is a *conditional* estate *at law*. The mortgagee holds *as his* the property mortgaged, on condition that the debt is not paid. All that equity has to do with the estate, is to relieve the mortgagor against a breach of the condition, by allowing him to redeem the property after such

Solomon vs. Sparks and Breazeal.

breach, on payment of the debt. And this, equity does, on the same principle on which it relieves the debtor by bond against the penalty of the bond. And that principle is, that it would be unconscientious in either case, to let the creditor hold on to his legal rights, when he is offered the money he lent with interest. This is the principle. There is no such principle as that the mortgage deed conveys the property, to the mortgagee "*in trust*" for the mortgagor, or conveys it, otherwise *in trust*. No such principle as that it creates the relation of trustee, and *cestui que trust* between the mortgagee and mortgagor.

It must follow then, that although it may be true, that a mortgage is a conveyance—an "assignment"—it cannot be true, that it is a conveyance, or an assignment, "*in trust*." And, therefore, it follows, that a mortgage deed, even if an assignment, cannot be within the provisions of the Act of 1818, aforesaid.

It was argued that a part of the debts provided for by the mortgage stood upon a different footing, from the rest, the part not enumerated, but as to which it was stipulated that they might be paid by Sparks, the mortgagee, when pointed out to him by Breazeal, and on Breazeal's request. It was argued, that these might be debts of a creation indefinitely subsequent to the mortgage. But we think that that was not the intention. We think, that the intention was, merely, to provide for some existing debts which, the parties could not remember, at the moment, or, as to which, they were undecided about putting them in the mortgage.

Even, however, if these were intended to be debts of future creation, that fact would not prevent the instrument from being, a *mortgage deed*, and, if it was a mortgage deed, it was not, as we have seen, within the Act of 1818. And the sole question in the case is, whether the instrument was within the provisions of that Act.

Judgment affirmed.

Farmers and Exchange Bank vs. Ruse, Patten & Co.

THE FARMERS AND EXCHANGE BANK, plaintiff in error, vs. |²⁷
RUSE, PATTEN & CO., defendants in error. |¹¹⁹
³⁰¹

A judgment in attachment, will be enjoined, if the defendant had a good defense to the suit, and his failure to make the defence, was owing, not to any fault or negligence on his part, but, to the fault of the plaintiff.

In Equity, in Muscogee Superior Court. Decision by Judge WORRILL, at May Term, 1858.

This was a bill filed by the Farmers and Exchange Bank of Charleston, South Carolina, against Ruse, Patten & Co., of Columbus, Ga. The bill states that on the 24th March, 1857, defendants sued out an attachment against complainant, returnable to May Term, 1857, of the Superior Court of Muscogee county, for a debt amounting to \$2,050, besides interest, which they alleged complainant owed them, but which the bill avers to be wholly pretensive and unfounded. That on the 25th March, 1857, the day after said attachment issued, the same was levied upon a desk, journal, bill-book and sign, as the the property of complainant. That the Mechanics Bank, of the city of Augusta, was served with garnishment on the 26th March, and on the 19th day of December, during the regular Term of Muscogee Superior Court, judgment was entered up in said attachment cause against complainant, for \$2,050, besides interest and cost.

The bill further states, that said attachment was sued out, and the judgment aforesaid procured without complainant's having any notice or knowledge thereof, and that the same is a great surprise, and operates most oppressively and unjustly upon complainant. That the first intimation that complainant had of the pendency of said suit, was by letter from Milo Hatch, Cashier of the said Mechanics Banks, dated 2d December, 1857, in which he informed complainant that his bank had been garnisheed on the 26th of the March preceding, and that by the advice of their attorney, he should, on

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that day, (2d Dec., 1857,) make answer that at the time of the service of the summons of garnishment, his bank had in hand belong to said complainant upwards of \$3,000. That soon thereafter complainant employed an attorney in Columbus, Georgia, to appear and defend said suit. That the attorney upon an examination, found that judgment had been obtained as before stated against complainant, and the Court had adjourned.

The bill further States that complainant has a good and valid defence to said suit; that the debt upon which said attachment issued and judgment obtained is unfounded, and has no existence; that complainant does not owe Ruse, Patten & Co. anything. That said judgment is utterly without consideration, and its enforcement under the circumstances, would be unconscientious and contrary to equity and good conscience.

The bill further states, that by reference to plaintiff's declaration in attachment, it appears that the demand consists of a check drawn by one Edward T. Taylor on complainant, at its pretended agency in the city of Columbus, Georgia, in favor of Ruse, Patten & Co., for \$2,050, dated 26th September, 1856, and by said Taylor marked across its face, "good forty-five days after date," and signed by said Taylor as agent of complainant; that at the time said check was thus accepted, Taylor was not agent of complainant, and had no authority to accept said check, or to do or transact any manner of business for, and on account of complainant, and which would have been proven on the trial of the attachment, if notice of said suit had reached complainant in time to have made defence.

The bill prayed, that all further proceedings on said judgment be enjoined; that the same be set aside, and that complainant be allowed to appear and defend said suit, and that another and new trial be granted.

The injunction issued by order of the Judge at chambers.

The bill was amended at May Term, 1858, stating that defendant obtained from Taylor said check and acceptance, as

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collateral security, to indemnify them against their liability as acceptors of a draft for \$2,000, drawn by Williams & Co., of Alabama, upon Ruse, Patten & Co., payable forty-five days after date, to the order of said Williams & Co., and by them endorsed in blank, and presented by Taylor for acceptance, and which they refused to do until Taylor gave them the check sued on. The draft of Williams & Co. was dated 26th September, 1856, the same day that the check bears date, and complainant states that Taylor had no authority to make such an arrangement as agent of complainant; that it was drawn for, and on his individual account, and to subserve his own interest and that of Ruse, Patten & Co.

The bill further states, that said draft purporting to be drawn by Williams & Co., was forged by Taylor; that it was afterwards paid by Ruse, Patten & Co., after said forgery was known. That Ruse, Patten & Co., are now insolvent, and suit is pending in Alabama against Williams & Co., on said draft, who are defending the same on the ground that it is not their bill, but is a forgery, and that said suit in Alabama is pending for the benefit of the Marine Bank of Georgia, to whom said draft has been transferred.

This bill and amended bill defendants answered, admitting the statements as to the suing out the attachment, and recovery of judgment against complainant as contained in the bill, and setting out the circumstances, under which said check was obtained, similar to those set out in the amended bill. They deny that they knew that Taylor was not the agent of complainant, and as such authorized to accept or make the check as he did; they allege that he had been for some time before the duly authorized and recognized agent of complainant in the city of Columbus, and if such agency had been withdrawn or discontinued, they had no knowledge of that fact, and no notice thereof had been given to them, or to the public.

They aver that complainants had legal notice of the proceedings in attachment; that it had such notice, and all the

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notice provided and required by law in such cases, and that their judgment was duly and legally obtained without fraud, and by due process of law. They deny that complainant has a good and legal defence to their action by attachment, and aver that said check was received from Taylor *bona fide*, and not to defraud or injure complainant.

They admit that since the bringing of the suit by attachment, that they have become much embarrassed in their pecuniary affairs, and that said claim has been transferred to the Marine Bank. They deny that they had any notice or knowledge that the draft accepted and paid by them was forged, or believed to be so at the time it was paid by them, but admit that Williams & Co. are defending the action against them in Alabama, on that ground.

Upon hearing the bill and amendments and the answers thereto, the Court dissolved the injunction upon the grounds, that there was no equity in the bill, and if there was, that it had been sworn off by the answers.

To which decision counsel for complainant except.

MARTIN & MARTIN ; and DENTON, for plaintiff in error.

DOUGHERTY ; and COOPER ; and MOSES, *contra*.

By the Court.—BENNING, J. delivering the opinion.

Was the judgment dissolving the injunction, right?

That judgment was put on two grounds—one, that there never was any equity in the bill ; the other, that if there ever was, it had been sworn off by the answers. Were these grounds sufficient?

First, as to the first ground. Is it true, that there never was any equity in the bill ?

The bill seeks to have a judgment enjoined—a judgment in favor of the defendants, against the complainant. Being a bill of that kind, it had equity in it, if its statements showed two things—first, that the complainant had had a good defence

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to the action at law ; secondly, and, that, the failure to make that defence there, was owing, not to any negligence or fault, in the complainant, but to fault in the defendants, or their attorney.

The statements in the bill, it is clear, showed the first of these two things. They showed, that Taylor had no authority from the complainant, to certify or accept, as complainant's agent, the check on which, the action at law was founded.

And those statements, taken in connection with the Cashier's affidavit filed with the bill, showed, as we think, the second of the two things.

They showed, that the judgment was dated the 19th of December, 1857, being a judgment rendered by the Superior Court of Muscogee county—that it was a judgment in attachment—that the attachment was served in Muscogee county and, also, in Richmond county—in Muscogee on the 25th of March, 1857, by a levy on a desk, a journal, a bill-book, and a sign—in Richmond, on the 26th of March, 1857, by a summons of garnishment, delivered to the Mechanics Bank of Augusta—that the complainant never heard of the attachment, until the 3d of December, 1857, sixteen days before the date of the judgment—that, on that day, the complainant's Cashier, Breese, received a letter from Hatch, the Cashier of the Mechanics Bank of Augusta informing him, that that bank, had been served with a summons of garnishment, in "Ruse, Patten & Co., vs. Farmers and E. Bank So. Ca." and that said bank was, on that day, going to answer through him that it owed complainant "\$3,000 and upwards."

That, on the same day, Breese replied to this, saying, that the information was "all news" to him—that, on the 4th, Hatch replied to this as follows;

"I understand from the plaintiff's attorney, here, George T. Barnes, that they expected to obtain a judgment against you, in Columbus, of something over \$2,000"—that on the 5th Breese replied to this, requesting Hatch "to ascertain,

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when the suit was brought," "with any further information which" he could "obtain"—that on the 6th, Hatch replied to this, saying, "we have not been able to see the attorney, to-day, —will do so to-morrow if possible"—that on the morrow, the 8th, Hatch wrote again, saying "the attorney here knows nothing of the case, Ruse, Patten & Co. vs. your Bank, only, that the suit was brought in Muscogee county, and that he was requested to garnishee this bank. He, will, however, write for information, and when received, I will advise you"—that Breese wrote, to Hatch, for the promised information several times, prior to the 16th—that, on the 16th, Hatch, wrote to Breese, saying, "Mr. attorney Barnes, has received no reply from his letter to Columbus, relative to the case of Ruse, Patten & Co. He thinks, you had better write to a lawyer in Columbus, at once, to look into the matter." This was but three days before the day of the judgment, the 19th, and the letter, it is probable was not received by Breese until the next day—two days before the judgment. Soon afterwards, Breese, taking the advice of Barnes, the attorney of Ruse, Patten & Co., did employ "a lawyer in Columbus," but it was too late; the judgment had, then, been rendered.

These facts are shown by the bill. There are some others which the law will assume;—namely, that a copy of the attachment, with the affidavit and bond, was transmitted to Richmond county, and was on file in the Superior Court, there, at the time when Mr. Barnes, the attorney for Ruse, Patten & Co., was applied to by Mr. Hatch, for information about the suit; and, that this was known to Mr. Barnes. *Sections 47, 48 of the Attachment Act of 1856.*

Now these papers contained all the information the complainant needed; their existence was known to Mr. Barnes, and they were within easy reach of him.

These things being so, by whose fault was it, that the complainant did not receive information of the suit, time enough to enable him, to put in his defence to it? By his fault or by the fault of the defendants or their attorney? By the

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fault of the defendant's or their attorney, we think. The suit being by attachment, did not of itself make itself known to the complainant. Certainly, it was owing to no fault in the complainant, that the complainant did not hear of the suit, until the 3d of December, sixteen days before the judgment was rendered. And the complainant's conduct consequent on the news of the suit, was equally free from fault. The complainant instantly set about acquiring the information necessary to enable it, to act on the defensive. It caused inquiry about the suit, to be made of the defendants attorney, in the suit; it obtained a promise from him, to procure and furnish the desired information; it relied on this promise, eight days—not an unreasonable time—and, surely, it had the right to rely on a promise of the defendant's own attorney. At the end of the eight days, the attorney let it be known, that he had failed to procure the information. This was within two or three days of the judgment, when it was too late, to do any thing. The failure, then, to put in the defence, was not owing to any fault in the complainant. It was owing, as we think, to fault in the attorney of the defendants, or fault in themselves. Why did he say, he should have to write to Columbus for information, when he might have referred the applicant for the information, to the papers of file in the Clerk's office in Richmond? Why, as he did write to Columbus for information, did the defendants there, not remit it to him? The time for judgment in their suit, was near at hand—the Court being in session. Did they dread a defence to their suit, and withhold the information lest it might be the means of bringing about a defence to the suit? We think that there was fault here, either wilful or negligent.

Our conclusion then is, that the statements in the bill, do show; first, that the complainant, did have a defence to the suit at law; 2ndly, that, those statements, taken in connection with facts of which, the Court itself takes notice, do also show, that the failure of the complainant, to put in this

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defence, was owing, not to any fault in the complainant, but to fault in the defendants, or fault in their attorney. Consequently, we think that there was equity in the bill.

The next question is, was this equity sworn off, by the answers? We are not prepared to say, that it was. On the great question--the authority of Taylor, to certify or accept the check, the answer seems to make this case: viz, that Taylor was at one time the agent for the complainant, and if his authority had ever been withdrawn, they did not know of it; and further, that he was still held out to the world, as agent, at the time he certified or accepted the check. But we are not satisfied, that this answer ought to dissolve the injunction, for 1st, the fact, if it was a fact, that Taylor was still held out as agent, seems to be new matter rather in avoidance of, than in response to, the bill; and 2ndly, we think it a question for the jury, whether, under the facts even as stated in the answer, the defendants ought not to have been presumed to know that Taylor acting as he did, was exceeding his authority.

The defendants are insolvent. It is better, we think, that the injunction be held up, until a trial.

Consequently, our conclusion is that the Court, below erred in dissolving the injunction.

Judgment reversed.

**BEDFORD S. WORRILL, et al., executors, plaintiffs in error, vs.
HENRY L. TAYLOR, administrators, defendant in error.**

Wm. Taylor gave to Philip F. Sapp, a receipt in the following words: "Received of Philip F. Sapp, administrator of Milledge Sapp, deceased, the following promissory notes for collection," (stating them)—"payable to Mil-

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ledge Sapp, or bearer. The executors of *Philip F. Sapp* sued the administrator of Taylor, on this receipt. There was evidence sufficient to authorize the jury to conclude, that this contract of collection, was made with Philip F. Sapp in his *individual*, and not in his *official* character. The Court granted a nonsuit. *Held*, that the Court ought not to have done so.

Assumpsit, in Randolph Superior Court. Decision by Judge KIDDOW, at November Term, 1858.

This was an action of assumpsit, by William West and Bedford S. Worrill, executors of Philip F. Sapp, deceased, against Henry L. Taylor, administrator *de bonis non* of William Taylor, deceased, upon a receipt given by William Taylor in his life, who was an attorney at law, for certain notes received by him for collection, from the testator, Philip F. Sapp. The receipt was as follows:

"Received from Philip F. Sapp, administrator of Milledge Sapp, deceased, the following promissory notes, for collection," (here the notes are described, amounting in all, to over \$1,300). "All the above and foregoing notes made payable to Milledge Sapp, or bearer, March 15th, 1848.

(Signed)

WILLIAM TAYLOR,
Attorney at law."

There were two counts in plaintiff's declaration—one that Taylor received said notes, as an attorney at law, to be collected, in consideration of a certain fee or reward to be paid to him; that he had collected the same, and had failed to pay over the same. The other count was, that Taylor had failed to collect said notes, as he had undertaken to do, &c.

Defendant pleaded the general issue, the statute of limitations, *plene administravit*, and set off.

Upon the trial, plaintiffs offered and read in evidence, the foregoing receipt.

Plaintiffs then proved that their testator agreed to loan William Taylor one thousand dollars, of the money to be collected on the notes mentioned in said receipt; and that Taylor had collected between \$800 and \$1,000, and that all

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the notes were good, and could have been collected with ordinary diligence. Philip F. Sapp, the testator, died in August, 1852, and William Taylor died in December, 1852.

Upon plaintiffs closing their testimony, counsel for defendant moved for a nonsuit, on the ground that the pleadings and evidence showed that no right of action was in plaintiffs, but that the administrator *de bonis non*, of Milledge Sapp, deceased, was alone entitled to bring suit upon the demand or cause of action, as set forth in the declaration.

Plaintiffs moved to amend their declaration, by striking out the word "as" wherever it occurred before the words "administrator of Milledge Sapp, deceased."

The Court refused the motion to amend the declaration, and granted the motion for a nonsuit; holding, however, that the amendment proposed by plaintiffs would not have changed the opinion of the Court, as to awarding the nonsuit. To which ruling and decision, plaintiffs excepted.

B. S. WORRILL, for plaintiff in error.

BARRY; and BEALL, *contra*.

By the Court.—BENNING J. delivering the opinion.

Ought the Court to have granted the nonsuit?

It is clear, that the Court ought not, if the evidence was such, that it would have authorized the jury, to conclude, that Philip F. Sapp, in the contract between him and Wm. Taylor, for the collection of the notes, acted in his individual, and not in his official character; and if the declaration states that he so acted. What then says the evidence? The receipt is in such terms, that it will bear either interpretation. And this being so, Mr. Beall admits it to have been at the option of the plaintiffs, which interpretation it should receive. But he insists that they have elected in their declaration, to treat it as a receipt made by Taylor to Sapp, in Sapp's representative or official character. As to that presently.

Such is the receipt.

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The further evidence is, that at the very time, probably, when the receipt was given, it was agreed, between Taylor and Sapp, that Taylor was to have, as a loan, \$1,000, of the money to be collected by him on the notes.

This is a fact which was quite sufficient to have warranted the jury in coming to the conclusion, that the contract of collection was one in which, Sapp acted in his individual, and not, in his official, character.

Does the declaration correspond, in this respect, with the evidence?

The declaration is not consistent, on this point. Sometimes it treats the contract as having been made with Sapp in his representative character; and sometimes, as having been made with him, in his individual character. The plaintiffs moved to amend it, so as make it treat the contract at all times, as an individual contract. And this motion, we think, was allowable under the Act of 1854, to amend pleadings, and, should have been granted—that Act will certainly authorize the correction of an ambiguity.

If then the declaration had been amended, the evidence was such, that, in our opinion, it would have authorized the jury to find for the plaintiffs.

Consequently, we think that the Court erred in granting the nonsuit.

Judgment reversed.

McDONALD, J. absent, on account of sickness.

Phillips vs. Stewart

WILLIAM B. PHILLIPS, plaintiff in error, vs. **PATTY STEWART**, and **MARTHA STEWART**, defendants in error.

[1.] The marriage of a *feme sole* defendant, pending the action, is no cause for an abatement of the action.

[2.] The verdict must be strongly against the evidence, to authorise reversing a judgment refusing a new trial asked for on the ground, that the verdict was against the evidence.

Covenant, tried before Judge LAMAR. Bibb Superior Court, May Term, 1858.

This was an action of covenant, brought by the plaintiff in error, against the defendants in error, for breach of the contract of warranty set forth in the following bill of sale: "Know all men by these presents, that we, Patty Stewart and M. P. T. Stewart, do bargain, sell and deliver unto W. B. Phillips, a certain negro girl named Nancy, age eighteen years old, for the consideration of nine hundred and fifty dollars, to us in hand paid; the right and title we do warrant and defend; also, warrant said girl sound and healthy, both in body and mind.

Macon, March 23d, 1857.

P. H. STEWART, (SEAL.)

MARTHA P. T. STEWART, (SEAL.)

Test: THOS. BAGBY.

On the trial of the case it was proven that the negro, Nancy, died about the 20th of July, 1857. *Thos. Bagby* swore: that he was present at the sale of the negro, and assisted defendants to make the sale; the negro was a healthy looking woman at the time of the sale, and if perfectly sound, was worth nine hundred and fifty dollars. The defendant, Patty Stewart, told Phillips, at the time of sale, that the negro had a cough, and that she had lately recovered from the measles.

F. Stubbs swore: that two or three days after the sale, he saw a negro woman named Nancy, about eighteen or

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nineteen years old, in East Macon, at the house in which plaintiff kept negroes for sale; she was feeble and looked delicate; she had a cough; she remained there eight or ten days, and was then sent to the plantation of Phillips, in Twiggs county.

Mr. John Hill swore: that he had boarded at Mrs. Stewart's; knew the girl Nancy; she waited on the table, before the sale: was a remarkably fine, healthy woman; she had had the measles, though she had a slight cough at the time of the sale. Nine or ten of the inmates of Mrs. Stewart's house had the measles, and none died. Mrs. Stewart was skillful as a nurse.

Henry D. Phillips swore: that about the first of April, 1857, plaintiff sent to his plantation, in Twiggs county, a girl named Nancy, about eighteen years old; witness was then overseer on the place; he put the girl to sowing cotton seed, but she became perfectly exhausted in an hour or two; witness went to her; she complained much of her head, and breast and breathed with much difficulty; her pulse was fluttering, and her breast beat so as to be perceptible to the eye; she did not work in the field any more, but stayed about the house; had a continued hacking cough; breathed so loud as to be heard all over the house; coughed most at night; expectorated a great deal of mucus; witness received from Phillips instructions to take good care of her, and not to put her to hard work until she got well, but to take good care of her; she was well cared for until witness left the place (on the 14th of June, 1857); but kept getting worse all the time.

John S. Williams, who commenced overseeing for plaintiff the 11th of June, 1857, corroborated the foregoing statement as to Nancy's condition at that time; she never was able to do any work after witness went on the plantation; sometimes she would set the table, and sweep up the house, but she soon became unable to do that; she expectorated a great deal of mucus, and sometimes coughed up blood; she was complaining all the time; witness called Dr. Rice in to

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see her, but he afforded her no relief; witness took good care of her; she left the place about the 1st July, 1857.

Dr. Hammond testified; that he was called in to see Nancy, eight or ten days before she died; made a *post-mortem* examination of her; the right lung was hepatized, and the left inflamed; was of the opinion she died of disease of the lungs, resulting from an attack of measles, and that she must have been affected by the disease some three or four months before her death. The condition of the lungs may have been produced in a shorter time. The left lung had an adhesion that is usually the result of inflammation arising from exposure, or cold. Measles have, generally, some cough, and when attended to, are generally within the control of medical treatment. Witness heard the foregoing testimony, and thinks the girl ought to have received medical treatment before she got it; plaintiff consulted witness about her, sometime before witness saw her; told plaintiff she was dangerous, and ought to be brought up to Macon to be attended to; saw the girl first, eight or ten days before her death; if she had the symptoms of breathing described by the overseer, Phillips, thinks the case had then progressed so far as to be incurable. If the girl, when healthy and strong, in appearance, as described by Hill, had received proper medical treatment, thinks she might have recovered; death from measles or their effects being rare. The best of treatment, however, sometimes fails in such cases.

Here the testimony closed, and the jury found a verdict for the defendants.

One of the defendant's, Martha P. T. Stewart, was married pending the suit. The marriage was never suggested of record, nor was her husband made a party to the suit. Neither plaintiff, nor his counsel, knew of the marriage, until after the rendition of the verdict.

Plaintiff moved for a new trial.

1st. Because the verdict was contrary to law, and contrary to evidence.

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2d. Because the aforesaid marriage was never suggested of record, nor the husband, H. S. Groves, made a party to the suit.

The Court below refused to grant the new trial, and plaintiff excepted.

STUBBS & HILL, for plaintiff in error.

LANIER & ANDERSON ; LOCHRANE & LAMAR, *contra*.

By the Court.—BENNING J. delivering the opinion.

Ought this Court to disturb the judgment of the Court below, overruling the motion for a new trial?

[1.] The first ground of that motion, was, that one of the defendants, a *feme sole* at the commencement of the suit, married before the trial, and that this fact was at the trial unknown to the plaintiff. But such a fact, is not even a ground for a plea in abatement. 1 *Saund. Ple. and Ev.* 7; *King vs. Jones*, 2 *Lord Ray.* 1525.

[2.] The second ground was, that the verdict was contrary to law and evidence.

We think, that there was evidence sufficient to support the verdict. The evidence made it doubtful, whether the death of the slave was not owing to the negligence of the purchaser in not supplying seasonable medical aid to the slave; and also made it doubtful, whether, the disease was not open and notorious—whether, indeed, it was not actually pointed out to the purchaser at the time of his purchase.

Judgment affirmed.

Martin vs. Williams.

ALEXANDER MARTIN, plaintiff in error, vs. **MATHEW E. WILLIAMS**, defendant in error.

**27 406
130 140** A sold a tract of land to B., in April, 1831; the deed was recorded in 1840. A sold the same land to C. in July, 1831; this second deed was recorded in 1836. *Held*, That the first conveyance would hold, neither having been recorded within time.

Complaint, in Terrell Superior Court. Tried before Judge KIDDOW, at September Term, 1858.

This was an action of complaint brought by the plaintiff in error against the defendant in error, for lot of land number 244, in the third district of originally Lee, but now Terrell county.

Plaintiff introduced in evidence, a grant from the State of Georgia to one Faulkner, to the aforesaid lot of land, and also several deeds, forming a complete chain of title, beginning with the State, and ending with himself.

Among the deeds so introduced by plaintiff, was one from Reuben Hill to John Rawls, conveying the land in dispute, dated "19th July, 1834," and duly recorded "the 5th day of May, 1836."

Defendant then introduced in evidence, a deed from the said Reuben Hill to one Daniel Mahoney, dated "3d of April, 1834," and recorded "the 28th day of May, 1840," and a complete chain of title from Mahoney to defendant.

Here the testimony closed.

The Court charged the jury, that if the foregoing statement of facts was true, they must find for defendant. Whereupon, plaintiff excepted.

STROZIER ; VASON & DAVIS, for plaintiff in error.

McCAY & HAWKINS, *contra*.

By the Court.—LUMPKIN J. delivering the opinion.

The question in this case is this: A. makes a **deed** to a

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tract of land to B., in April, 1834, which is recorded in 1840. In July, 1834, A. sells the same land to C., who records his deed in 1836. Which vendee will hold the land?

The Act of 1837 declares, that where the same person conveys the same land to different persons, if both deeds are recorded in time, or neither, that the oldest deed shall be preferred. But that Act applies, in terms, only to deeds *thereafter* to be made. Was the law different before 1837? We rather think not.

It is insisted, that under the Act of 1785, in deeds of bargain and sale, enrollment takes place of feoffment with livery of seizin. And that consequently, the youngest deed being first recorded, is entitled to priority. In other words, that registration consummates the conveyance.

But by examining that Act, it will be found that deeds of bargain and sale would only be good under that Act, provided they were recorded within twelve months. Here, two years elapsed between the execution and registration of the junior deed. This argument, therefore, cannot save it, admitting it to be sound.

The Act of 1837 is founded in justice. The oldest vendee, in this case, took his deed three months before the second; and more than two years before the second deed was recorded. What good, by way of notice, is this registration to effect? The second vendee having bought within the twelve months allowed to the elder to record his deed, he is not prejudiced by the failure of the first purchaser to record in time. Had he bought after the expiration of the year, without notice, instead of within three months from the date of the first sale, the equities would have been very different.

Judgment affirmed.

McDONALD J. absent.

Rhame vs. Bower.

JEREMIAH RHAME, plaintiff in error, vs. **ISAAC E. BOWER**, defendant in error.

The note on which, an action was founded, referred to a bond as having been given by the plaintiff, the payee of the note, to the defendant, the maker of the note. The plaintiff read this note in evidence. A bond was then offered in evidence, by the defendant, as the bond referred to by the note—the defendant insisting, that no farther proof of the execution of the bond, was necessary. The note and bond agreed in many particulars, and in none, differed.

Held, That the bond was admissible without farther proof.

Complaint, in Baker Superior Court. Tried before Judge **ALLEN**, at May Term, 1858.

This was an action by Jeremiah Rhame against Isaac E. Bower, on the following note, viz:

\$300. On the first day of January next, I promise to pay Jeremiah Rhame, three hundred dollars, for one stock of cattle, for which the said Rhame has this day given me a bill of sale. 7th May, 1853.

(Signed)

I. E. BOWER.

Endorsed with the following credits: "March 20th, 1854,
\$200 00 pd. July 5th, 1855, \$44 13 pd."

The defendant pleaded, 1st. The general issue. 2d. Payment. 3d. Failure of consideration, in this, that plaintiff failed to deliver to defendant the stock of cattle mentioned in said note, but only delivered a part thereof, and failed and refused to deliver the remainder. Defendant set out in his third plea, *in hac verba*, the following bill of sale, to-wit:

GEORGIA, BAKER COUNTY.

This is to certify that I have sold, bargained and conveyed to Isaac E. Bower, for the sum of three hundred dollars, all my stock, mark and brand of my cattle, on the east side of the Ichawaynochaway creek, including bulls, cows, calves, heifers, yearlings, and all other stock, including also that portion of my stock of cattle known as the "Norman" stock, and the "Holden" cow, together with all my right, title, interest and

Rhame vs. Bower.

claim to cattle on the east side of said creek, hereby insuring the delivery to said Bower, of sixty head at the least. And I also promise to replace one three year old steer at this time, for one which was supposed to be mine, but which is not; for which said Bower has this day given me his note. 7th May, 1853.

(Signed)

By his agent,

JEREMIAH ✕ RHAME.
mark
his
OBEDIAH ✕ RHAME.
mark

Upon the trial on the appeal, plaintiff read in evidence the note sued on, and closed.

The defendant tendered the bill of sale, without proof of the execution of the same. The plaintiff objected to its admission, until the execution was proved, and until it was further proved that Obediah Rhame, who signed by *his* mark, as agent for plaintiff, had authority so to act.

The objection was overruled, and plaintiff excepted.

The jury found for the defendant, and plaintiff moved for a new trial upon several grounds, all of which were abandoned in this Court, except the one above stated. The Court refused the motion for a new trial, and defendant excepted.

LAW & SIMS, for plaintiff in error.

ISAAC E. BOWER, *contra*.

By the Court.—BENNING J. delivering the opinion.

Was the Court below right, in admitting the bond to the jury? The objection to the Court's doing so, was, that there was no proof, that the bond was the bond of the plaintiff.

The question, then, is, was there proof, that the bond was the bond of the plaintiff? And, if it was not, was any such proof needed, to make the bond admissible as evidence?

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The note on which the action was founded, and which the plaintiff had read to the jury, had, on its face, a reference to some bond made by the plaintiff to the defendant. If this was that bond, then the note, with the fact of its admission to the jury, proved it, the bond of the plaintiff. Was there enough on the face of the note, to show, that this was that bond?

We think, that, *prima facie*, there was. There were many particulars on the face of the note, with which the bond agreed, not a particular from which it differed.

Therefore, we think, that the Court was right, in admitting the bond to the jury.

The Court, perhaps, put its judgment, on the proviso in the 9th section of the Judiciary Act of 1799; a proviso in these words: "That no person shall be permitted to deny any deed, bond, bill, single or penal note, draft, receipt, or order, unless he, she or they, shall make affidavit of the truth of such answer, at the time of filing the same." Perhaps this may be, a sufficient ground, but we are not, as yet, prepared to say so. The words seem to be confined, to the case of a *defendant*. It is true, we believe, that, in cases in which, a note or other writing has been pleaded as a set-off, it has been held, that the defendant need not prove the note or other writing, unless it is denied by the plaintiff. But this is not conclusive; for a plea of set-off is, substantially, a cross action, in which, the plaintiff becomes defendant, and the defendant, plaintiff.

Our affirmance, then, is placed on the first ground.

Judgment affirmed.

McDONALD J. absent.

Roberts et al., vs. Moore.

JAMES L. ROBERTS, et al., plaintiffs in error, vs. WILLIAM 27 41
117 987 MOORE, defendant in error.

- [1.] Every application for a continuance, should be heard by the Court, and determined according to its circumstances.
- [2.] An attorney may in some cases, make a showing to continue a cause, notwithstanding the client lives in the county.
- [3.] A material witness, who is absent *in Texas*, at the time of trial, will not be presumed to have absented himself fraudulently to enable the party subpoenaing him, to delay the case.

Complaint, in Randolph Superior Court. Tried before Judge KIDDOW, at the May adjourned Term, 1858.

This was an action by William Moore, against James L. Roberts and Simpson Moore, on a promissory note, for the sum of six hundred and sixty-one dollars and thirty-five cents, payable to William G. Gay or bearer, and due the first day of January, 1857. There was a credit on the note of fifty-two dollars, dated 18th day of December, 1856; and one of one hundred dollars, dated the 22d day of January, 1857.

The defendants pleaded the general issue, and usury to the amount of forty-eight dollars.

When the case was called for trial, the plaintiff announced himself ready; and the defendants, by their attorney, John A. Tucker, Esq., moved for a continuance of the cause, on account of the absence of Dr. James Mercer, a material witness for the defendants. The defendants were not in Court; and their attorney stated in his place, that said defendants lived about fifteen miles from Cuthbert (the place where said Court was sitting); that defendants had been in attendance, every day, since the session commenced, and he believed would be in Court in a few moments. This was early in the morning, soon after the meeting of the Court. The attorney then moved the Court to postpone the case, a short time, which was refused. He then moved that he be allowed to make a showing for a continuance, as defendants were

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absent. He further stated, that Dr. Mercer was absent on a visit to Texas; that he had talked with him, and knew that his testimony would be material.

The Court overruled the motion, and refused to let the attorney make the showing; on the ground that the attorney could not state in his place, that the witness was not absent, by the consent or procurement of defendants.

To which refusal the defendants excepted.

TUCKER & BEALL, for plaintiffs in error.

HOOD & ROBINSON, *contra*.

By the Court.—LUMPKIN, J. delivering the opinion.

This case being in the last resort, counsel for defendant, in the absence of his client, proposed to continue the case, to procure the testimony of a material witness, who was absent on a visit to the State of Texas. It was shown that the witness had been subpœnaed, and that his testimony was material.

The case was called early in the morning; and the defendant, who had been in attendance regularly, during the Term, resided fifteen miles from town.

The Court refused to allow the attorney to make the showing, and gave as a reason, that he knew, that the attorney could not state in his place, that the witness was not absent by the client's consent or procurement.

That there are cases where the attorney may continue, notwithstanding the client lives in the county, there can be no doubt. Suppose the witness be sick, and that fact is known to the attorney? Could it be reasonably presumed, in this case, that the witness went to Texas to get out of the way, when by crossing the river, or even remaining at home, the same end might be accomplished?

The Court, in all cases, instead of prejudging, should hear

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the showing, and then decide upon its sufficiency, according to the circumstances; and not assume, in advance, that a fraud is intended to be practiced, when the facts so strongly rebut that conclusion.

Judgment reversed.

McDONALD J. absent.

JOHN FULTON and WIFE, plaintiffs in error, vs. JESSE SMITH
et. al., defendants in error.

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[1.] The misjoinder of a party, may be obviated by an amendment; therefore, it is not a ground for dismissing the bill.

[2.] A father made advancements to his sons, when he was not in a sound state of mind. The sons and the daughters agreed, that the advancements should be set aside, and the father's property, including the advanced property, divided out among the sons and daughters, with an advantage to the sons each, of \$1000.

Held, that there was a sufficient consideration for this agreement.

[3.] Such an agreement is not against public policy.

In Equity, from Houston county. Decision on demurrer,
by Judge LAMAR, at October Term, 1858.

This bill was filed by John Fulton and wife, against William P. Gilbert, executor of William Smith, deceased, Thomas Pollock, administrator of Risden Smith, deceased, M. S. Burney, administrator of Needham Smith, deceased, and the widow of said Needham, who was the daughter of the testator, William Smith, deceased, Alexander Smith, Josiah Hodges and wife, Garat Smith, and Jesse Smith, to compel

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the specific performance of an agreement, made by and between all the above named parties, except Gilbert, relative to the disposition of the estate of said William Smith, their father, to be effected and carried out after his death.

The bill alleges that William Smith, the father, being old and infirm both in mind and body, and yielding to the importunities of some of his children, gave off to some of them, the bulk of his estate. That to save trouble and the expense of litigation, and to settle matters amicably, his sons and sons-in-law, on the 27th November, 1847, met together, and entered into an agreement in writing, under seal, wherein it was recited and agreed, as follows:

“That whereas the said William Smith, desirous of releasing himself of the care and management of his estate, has divided the same among us, his heirs, by deed and otherwise, giving some decidedly the advantage of others, which we believe was not his intention when he was of a sound and disposing mind and memory. And we, wishing not to cross him, and consequently disturb the few remaining days of his stay on earth, do hereby bind ourselves, our heirs and assigns, to abide by the following agreement.

“First, that we receive the personal property, deeded as above stated, having the same valued by three disinterested persons, at the valuation. And that the three lots of land, deeded to Risdan Smith recently, return to the estate, only reserving to said Risdan the use of the houses, and so much of the land as he may wish to cultivate during the lifetime of our father, the said William Smith, and one year thereafter, should he die in the latter part of the year, so as not to give the said Risdan time to improve his own land so as to be able to make a crop on the same, the residue of the plantation to be rented if opportunity offer, and the revenue to belong to the undivided part of the estate. And after the death of our father, each of us to render in on oath, all that we have heretofore received, as well as all we may hereafter receive from our father, in land, negroes, money, notes, or any other thing,

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the value to be estimated at the time of reception ; and should we be unable to agree on valuation, we will refer the same to three disinterested persons, whose decision shall be final and binding on all. And after ascertaining what each has received, then they that have not received as much as those that have received most, shall receive of the undivided part of the estate, until all are equal, (only reserving to the male heirs one thousand dollars advantage of the females) and the residue if any, to be equally divided among all.

"And should the residue or undivided estate not be sufficient to bring up all equal, then those who have received most are to pay over to those that are minus, until all are equal, except the thousand dollars in favor of the males as above reserved.

"In witness whereof, we have affixed our hands and seals, this, the 27th November, 1847."

The bill further states, that all the persons signing said agreement, except plaintiff and wife, who was a daughter of said William Smith, received large amounts of property in money, over and above their equal share, as mentioned in said agreement, and that they refuse to account for the same and pay over any part thereof to plaintiff and wife, or to abide by their said agreement.

The bill further states, that the said William Smith, (the father) made his last will and testament, while in a state of imbecility, appointing said Gilbert his executor, who upon the death of said William, propounded said will; that the same was admitted to probate, and Gilbert qualified as executor thereof.

The bill prays, that an account be taken of all the property advanced to, and received by, each child, and to set up and enforce said agreement, &c.

To this bill defendants demurred.

1st. Because it is multifarious, in joining Gilbert, the executor of William Smith, deceased, as a party defendant, with the parties to said alleged agreement.

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2d. Because said agreement set out in the bill, is without consideration and purely voluntary.

3d. Because the bill seeks to enforce an agreement that is contrary to good morals and public policy, in this, that it had its inception in a design and effort on the part of the children, clandestinely to defeat and thwart the wishes of their parent in his lifetime, touching the disposition of his property.

4th. Because the bill seeks to transfer from the Ordinary, a question, belonging exclusively to that jurisdiction, to the Court of Equity, touching the intestacy of William Smith, deceased.

5th. Because it seeks to usurp the jurisdiction of the Ordinary, in trying the validity of the will of William Smith in a Court of Equity.

The Court sustained the demurrer and dismissed the bill, and counsel for plaintiffs excepted.

STUBBS & HILL, for plaintiffs in error.

WARREN & GOODE, *contra*.

By the Court.—BENNING J. delivering the opinion.

Was the Court right in sustaining the demurrer to the bill?

The first ground of the demurrer, was, that Gilbert, the executor of Smith, the elder, was improperly joined with the other defendants, in the bill.

[1.] This was a good ground, unless Gilbert had in his hands, some of the property covered by the agreement. It does not appear whether he had, or not. Therefore, he must be struck from the bill, unless a statement shall be added to the bill, that he has in his hands, some of the property covered by the agreement. But objections of this sort, are not sufficient to justify the dismissal of a bill. They are subject to be obviated, as a matter of course, by amendment.

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[2.] The second ground was, that the agreement was without consideration.

But we think it, not true that the agreement was without consideration. The sons were, by the agreement, to have, by \$1,000, the advantage over the daughters in the father's estate. There was sufficient cause for setting aside the advancement, made by the father, to the sons. These set aside, the sons and daughters would have shared equally in the father's estate. The agreement in effect stipulated, that the daughters should pay to each of the sons, \$1,000, for relinquishing the advancements. This was ample consideration to the sons.

The sons were in possession of the property advanced to them by the father; of most of it, under deeds from the father. This gave to the sons a great advantage over the daughters, in respect to this advanced property. And the only way open to the daughters, to overcome this advantage, was by a suit at law or in equity. And, to the carrying through of such a suit, considerable expense to the daughters, would be necessary—expense of money, in the payment of lawyers, fees—expense of time and labor, in the attendance of them, or their husbands, on the Court, and in the preparation of the case. This expense, the agreement saved to the daughters. And that was a sufficient consideration to *them* (or their husbands) to enter into the agreement.

We think, then, that it is not true, that this agreement, was without a sufficient consideration.

Indeed Courts of Equity hold, that in all family agreements of this kind, there is a sufficient consideration to support them, whether that consideration be obvious or not. *Watkins vs. Watkins*, 24 Ga.

[3.] We do not agree at all, with the third ground of the demurrer. We think, that the agreement was in accordance with, rather than "contrary to, good morals, and public policy."

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[4.] The daughters, it is true, did not by the agreement, get full justice ; but, it is also true, that they came much nearer to getting it, than they would have come, had things remained as they were before the agreement. And, as to the thwarting of the father's wishes—he had no wishes when he made the advancement, for then, he was not "of a sound and disposing mind and memory." Natural justice, as well as our statute of distributions, puts all a man's children on an equality, with respect to the property which he leaves behind him, when he dies.

The object of the bill, is merely to compel the specific performance of the agreement ; nothing more. Therefore, the last two grounds of the demurrer, are not true in fact.

Thus then, it appears, that, in our opinion none of the grounds of the demurrer, was good. We, must hold, therefore, that the Court erred in sustaining the demurrer.

Judgment reversed.

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123 489* JOHN DOE, ex dem., THOMAS TENANT, DIAL PEAVY, and
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fl128 524* GEORGE D. WILEY, plaintiff in error, vs. RICHARD ROE, casual ejector, and STEPHEN BLACKER, tenant in possession, defendant in error.

- [1.] The drawer has before grant, a vendible interest, in the land drawn.
- [2.] Powers of attorney may be recorded under the same rules, as the deeds made under them; and, when thus recorded, may be read in evidence, in the same way, as those deeds.
- [3.] Peavy gave to Carter, a power of attorney to convey a lot of land. Carter, in executing the deed, signed his own name, instead of Peavy's name. But there was enough on the face of the deed, to show, that Carter intended the deed as Peavy's, and not as his.

Held. That the deed was a sufficient execution of the power.—BENNING J.

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Ejectment, in Clay Superior Court. Tried before Judge Kiddoo, at September Term, 1858.

This was an action of ejectment, by John Doe, *ex dem.*, Dial Peavy, and others, against Richard Roe, casual ejector, and Stephen Blacker, tenant in possession, for lot of land No. 69, in the fifth district of originally Early, now Clay county.

The evidence on the part of the plaintiff, consisted of a grant from the State to Dial Peavy, dated 7th January, 1836; a deed from Peavy to Thomas Tenant, dated 3rd May, 1840; then a deed from Tenant to George D. Wiley, dated 12th June, 1840; and the admission by defendant that he was in possession of the premises sued for, at the commencement of the action.

Defendant offered in evidence a power of attorney by Peavy to Jesse Carter, of the county of Fayette, authorizing Carter to sell the lot in dispute, dated 9th November, 1835, signed "Dial Peavy his Δ mark," witnessed, "Wm. McRay, Lewis Miles, J. P.;" and a deed of conveyance by virtue of said power, from Carter to John Burke, deed executed and signed by Carter thus: "Jesse Carter, [L. s.]" and dated 9th January, 1836, and both the power of attorney and deed recorded in the office of the Clerk of the Superior Court of Early county, 17th December, 1840.

Plaintiff objected to the admission of the power of attorney on the grounds, that the same was made prior to the issuing of the grant to Peavy, and that Peavy, the grantee, made a deed to Tenant, one of plaintiff's lessors, subsequently to the issuing of said grant. The Court overruled the objection, and admitted in evidence the power of attorney and deed, holding that, in as much as the deed was not made till after the grant issued, the execution of the power before the grant, made no difference. To which decision plaintiff excepted.

The plaintiff further objected to the admission of said pow-

Tenant, Peavy and Wiley vs. Blacker.

er of attorney, because the same was not proved as required by law. Objection overruled and plaintiff excepted.

Plaintiff further objected to the admission of the deed, because it was signed by the attorney only, and not by Peavy, by attorney. The Court overruled the objection, and plaintiff excepted.

The jury found for the defendant, and plaintiff moved for a new trial on the grounds:

1st. That the Court erred in admitting in evidence the power of attorney aforesaid.

2d. That the Court erred in admitting in evidence the deed executed by Carter to Burke.

3d. That the verdict was contrary to law and evidence.

The Court overruled the motion for a new trial, and plaintiff excepted.

WELLBORN, JOHNSON & SLOAN; JOHN H. JONES; and E. H. BEALL, for plaintiff in error.

PERKINS; and GAINER, *contra*.

By the Court.—BENNING J. delivering the opinion.

[1.] The first objection to the power of attorney, was not insisted on. And we think that there was nothing in the objection. The drawer has, before grant, a vendible interest; as this Court has repeatedly held. *Dugas vs. Lawrence*, 19 Ga. 557.

The second objection to the power of attorney, was, that its execution was not proved.

The power was recorded, and on the same day as the deed; and it was attested by two persons, one of whom, signed as a justice of the peace. The deed was regularly recorded. Was all this enough to prove the power of attorney?

If there is any statute which says any thing about the recording of powers of attorney, we cannot find it. And yet

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we believe, that it has ever been the practice to record powers of attorney, along with the deeds made under them, and to do so, on the same sort of proof as that on which the deeds are recorded; and, that it has ever been the further practice, to let such powers of attorney, when thus recorded, go in evidence, without further proof, along with their deeds. And this practice, we suppose, to be founded upon the opinion, that the power of attorney, is really a part of the deed made under it, and, that the law authorizing the registration of deeds, authorizes the registration of every thing that makes a part of the deeds—and, consequently, that it authorizes the registration of the powers of attorney under which the deeds may be made. We are not prepared to say, that such an opinion as this, is incorrect, and therefore, we are not prepared to disturb this practice, which is of so long standing.

[2.] So, we cannot sustain the second objection to the power of attorney. Therefore, we hold that the Court was right in letting the power go the jury.

[3.] The objection to the admission of the deed, was, that the name of the attorney, instead of the name of the principal, was signed to it. There was, however, enough on the face of the deed, to show, that the attorney in thus signing his own name, was acting as attorney, and not, as principal. That being so, the deed was unquestionably a good execution of the power in equity. And if it was a good execution of the power in equity, then it was, I think, a good execution of the power at law, under the Act of 1820. *Cobb*, 464. That Act relieves all parties from the necessity of going into equity, in any of the cases which it enumerates, (and they are all the cases over which equity has had given to it, jurisdiction,) "whenever" they "shall conceive," that they can establish "their claim without resorting to the conscience of the defendant."

There is enough on the very face of this deed, to show, that the intention in its execution was, that it should be the deed of Peavy, the principal, and not, of Carter, the agent.

Orr, ad'mr vs, Huff.

I think, then, that the objection to the deed was not good.

Consequently, my conclusion is, that the Court below was right, in all the decisions excepted to.

Judgment affirmed.

**DICKINSON W. ORR, administrator, plaintiff in error, vs.
TRAVIS HUFF, defendant in error.**

Motion for a new trial, on the ground, that the verdict was against the evidence, and motion refused. There was much evidence in favor of the verdict.

Held, that the refusal of the motion was not to be disturbed.

Assumpsit, in Macon Superior Court. Tried before Judge LAMAR, at September Term, 1858.

This was an action by Travis Huff, against Dickinson W. Orr, administrator of Andrew J. Orr, deceased, to recover damages for the breach of warranty, of the soundness of a slave sold by the intestate, in his lifetime, to plaintiff.

The following is the bill of sale, containing the warranty, for the breach of which the action is brought:

"**GEORGIA, BIBB COUNTY.**

April 13th, 1850.

Received from Travis Huff, four hundred dollars, in full payment for a negro girl named Fanny, about nine years of age. I warrant said girl sound in body and mind. I also warrant and defend the title against all claims whatever.

(Signed)

A. J. ORR."

The declaration alleged, that said slave was, at the time of said sale, unsound in mind and body, and became an

Orr, ad'mr vs. Huff.

idiot, and of no use or value to plaintiff, but a burden and expense; and there was annexed, a bill of particulars, of the money paid out to physicians, and for burial expenses, amounting to sixty dollars. Damages laid at one thousand dollars.

The defendant pleaded, first, the general issue; second, the statute of limitations; third, a special plea, that there was no breach of the warranty contained in said bill of sale.

Upon the trial on the appeal, plaintiff offered and read in evidence, the bill of sale above set out.

It was admitted by the defendant, that plaintiff commenced a suit, for the same cause of action, against his intestate, 20th July, 1855, but the writ was not served before his death, which occurred 25th July, 1855. (This action was commenced 7th February, 1857.)

Plaintiff then read the depositions of *Doctor Henry Saunders*, taken by commission, who, in substance, proved that he examined the girl in February or March, 1854; that she was affected with chorea, or St. Vitus dance; was so much reduced as to be scarcely able to stand; made such an examination as satisfied him as to her condition. From the shape of her head, and idiotic expression of countenance, and general appearance, thinks she must have been diseased from childhood; was not developed as a child of her age ought to have been.

Doctor Gabriel Harrison, examined by commission, testified, in substance, that he was at plaintiff's in June, 1854, and was requested by him, to see the girl, and examine her, and give his professional opinion as to her condition; examined her, and found that she was idiotic; was almost entirely senseless; could not get her to speak three words together correctly, or intelligently; say yes for no, and *vice versa*; told plaintiff it was almost a hopeless case, as she was having epileptic fits regularly; treated her for about eight months, and then took her to his own house, where she remained fifteen or twenty days, and gradually got worse;

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while at witness's house had from seven to eight fits a day; examined her carefully every day, while at his house; treated her case actively; nothing mitigated her symptoms, in the least; nothing very striking in the conformation of her head, except, that it was very small. When witness first saw her, she had a very simple expression of countenance, and stated to Mr. Huff that she had no sense; this was before witness examined her. Cannot speak positively, but gives it as his opinion, that the girl's mind must have been impaired, before the 13th April, 1850; from the general deranged condition of her whole system, and the frequent recurrence of the paroxysms, her disease was one of long standing; she died soon after leaving his (witness's) house, a confirmed idiot.

Elizabeth Huff, a daughter of the plaintiff, examined by commission, testified that she knew Fanny; had repeated occasions and opportunities for examining her as to the soundness of her mind; she was idiotic; as often answered yes for no, and no for yes, and do the contrary of what she was bid to do. In all she did and said, she showed an entire want of sense. From these, and many other circumstances, is of opinion that she was unsound in mind on the 13th April, 1850.

William Huff, a son of plaintiff, swore, that he was living at home when his father purchased the negro; had charge of his father's business; she was put to work immediately, and witness worked with her, and soon discovered that she was very dull, and afterwards that she was of unsound mind; she gradually grew worse as long as witness remained; left home in 1853; thought she was older than described in the bill of sale; never grew much after his father bought her; won't say she was a confirmed idiot when he left his father, but she was worthless; did not comprehend what was said to her; never considered her sound in mind after she was put to work, and had no sufficient opportunity of judging before.

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Cross examined: Plaintiff purchased a negro woman and two children of A. J. Orr, in 1853 or 1854; a tender back of the girl, Fanny, was made in 1854, or 1855; knows of no tender before that time. Plaintiff often saw Mr. Orr from the time he purchased Fanny, up to 1855; don't know that he ever made any complaint to him about her unsoundness before 1854 or 1855; did not regard the girl as having entirely lost her mind up to 1853, when he (witness) left home; she was put to work in 1850 or 1851. No physician was called to her while witness remained at his father's; she was worse in 1851 than in 1850, and gradually grew worse.

Here plaintiff closed.

Dr. Arthur M. Pitts, sworn by defendant, testified in substance, that he was a regular physician, but not now practicing; had practiced for nine years. His professional opinion was, that it was "utterly impossible for any physician, in 1854, to have told what was the condition of a girl nine years old, in April, 1850. The disease as described by Doctors Harrison and Saunders, generally comes on in females, at the age of puberty; that is, from 12 to 15 years of age."

Cross examined: The disease as described by Doctors Harrison and Saunders, is a very dangerous one, and does not generally, at first, attack the mind, but has known cases to attack the mind.

D. W. Orr, administrator, and defendant, having paid all cost in the case, and a sufficient amount to cover all that might accrue, was tendered as a witness, and on his *voir dire* stating that he had no individual or pecuniary interest in the final result of the suit, was sworn in chief—testified that he knew Fanny; he purchased her for A. J. Orr, in Virginia, about four months before plaintiff bought her; saw her frequently before the sale. Witness has bought and sold negroes, several hundred; hardly ever made a mistake in the soundness of one; when he purchased Fanny for A. J. Orr, made a careful examination of her, by talking with her a long time, and made a rigid examination of her

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person ; saw nothing to arouse a suspicion that she was defective in her mind ; she was as smart as other negroes of her age ; conversed frequently with her, up to the day of the sale to plaintiff, and never saw any circumstance to show that her mind was affected ; she was as smart as eight out of ten of her age ; never heard of any complaint about her being unsound until 1855. Plaintiff saw A. J. Orr, often after the purchase, before 1855. Witness says, that after he has examined and purchased a negro, and pronounced him or her sound, would release a seller from his warranty for five dollars ; is perfectly satisfied that the girl, Fanny, was sound in mind and body, at the time she was sold to plaintiff.

Cross examined.—Has been mistaken in the soundness of a negro after an examination ; was sometimes a partner of A. J. Orr, in the purchase and sale of negroes, both before and after the sale of Fanny to plaintiff, but had no interest whatever in her ; sometimes bought on his own account, and sometimes A. J. Orr bought on his account. Bought the girl Fanny, with the funds of A. J. Orr, and was not interested in her purchase ; was not then in the trade.

Defendant here closed. The Court charged the jury, to which there was no exception, and the jury found for the plaintiff four hundred dollars, and interest thereon from the 13th April, 1850. Whereupon, defendant moved for a new trial, upon the grounds, that the verdict was contrary to law, contrary to evidence, and strongly and decidedly against the evidence, and the weight of evidence.

The Court refused to grant a new trial, and to this decision defendant excepted.

POE & GRIER ; S. & T. G. HALL, for plaintiff in error.

STUBBS & HILL, *contra.*

By the Court.—BENNING J. delivering the opinion.

The Court below refused to grant a new trial. Ought this

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Court to disturb that decision? We think not. We cannot say, that the verdict was decidedly and strongly against the weight of the evidence. There was much evidence for the verdict; one great fact was, that the child never grew any after the sale; but even, if the verdict was decidedly and strongly against the weight of the evidence, it would not follow, of necessity, that a new trial ought to be granted. Even, in such a case, the Act of 1854, merely confers the power, in the exercise of a sound discretion, to grant a new trial; the act does not impose the duty to grant a new trial.

Judgment affirmed.

**SETH C. STEVENS, plaintiff in error, vs. LEWIS ZACHARY,
defendant in error.**

The security to be exacted of a party who asks that another may be required to produce his deed, or other writing, to be annexed to interrogatories, ought at least to be as much as a bond of indemnity and a consent that if the deed or writing be not restored, objections to it shall be waived and the copy of it on file be read in its place, not only in that case, but in all subsequent cases.

Ejectment, in Baker Superior Court. Decision by Judge ALLEN, at November Term, 1858.

This was an action of ejectment, by John Doe, *ex dem.*, Lewis S. Zachary, against Richard Roe, casual ejector, and Seth C. Stevens, tenant in possession.

Plaintiff, preparatory to trial, submitted a motion, that Stevens the defendant be ordered to file in the Clerk's office, within twelve days after the adjournment of the Court, the original deeds from Lewis Zachary to William Kolb, and

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from Kolb to Manbey N. Ford, to the lot of land in dispute, and under which deeds he claims title to said premises, subject to the control of the plaintiff or his counsel, to be attached to interrogatories, to be propounded to witnesses, to prove said deeds to be forgeries; upon said plaintiff giving bond with good security in the sum of two thousand five hundred dollars, and filing the same in said office, conditioned to be void if said deeds should not be lost or destroyed or injured, and should be returned to said Stevens as soon as the object for which they are produced shall be accomplished; and upon plaintiff's filing in the Clerk's office copies of said deeds for defendant; and that a copy of this order be served on said Stevens two days from the adjournment of the Court.

Defendant objected to this motion. The Court overruled the objection and granted the order, and defendant excepted.

Abner B. Parratt, one of the plaintiff's lessors, then tendered his bond with security, as required by said order, in the penalty of twenty-five hundred dollars; conditional, that if the deeds ordered to be produced and deposited in the Clerk's office, "after they came under the control of and are delivered to the said Parratt or his counsel, should not be destroyed, lost or injured, but should be returned to said Stevens, as soon as the object of their production shall have been accomplished," then the bond to be void, &c.

Defendant objected to the bond as insufficient in its terms and conditions to indemnify him against the loss or destruction of the original deed.

The Court overruled the objection and ordered the bond to be filed as a compliance on plaintiff's part with the order.

To which decision, defendant excepted.

R. F. Lyon, for plaintiff in error.

WARREN & WARREN, *contra*.

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By the Court.—BENNING J. delivering the opinion.

Was the Court below right, in granting the order?

Two objections are urged against the granting of the order; one, that the Court had no power to grant any order, the effect of which, would be to send the paper annexed to interrogatories, into another county; the other, that if the Court had any such power, it was a power only to be exercised on the exaction of the best attainable security—that the order should work no prejudice to the party required to produce the paper—and the bond exacted, was not by itself the best attainable security that the order should work no prejudice to such party.

These objections were urged with great force, still we are not prepared to say, that we think, the first of them was good. We are not yet satisfied, that the reasons which were given in *Faircloth vs. Jordan*, (15 Ga. 512,) for belief in the existence of this power, are insufficient.

The second of the objections, was, we do think, good.

Conceding that this power exists, it is obviously one to be exercised with the greatest caution and circumspection. The principle on which the power ought to be exercised, is doubtless this; that the party required to yield his paper, ought in return, to receive the best security that his doing so shall not hurt him, which it is possible to exact from the other party, consistently with the practicable attainment of the end in view—the sending of the paper to the witness, that his examination on it, may be taken.

All the security required here, was the bond of the party calling for the production of the deeds, conditioned to be void, if the deeds should not be destroyed, lost or injured, but should be returned, as soon as the object of their production, had been accomplished. Such a bond as this, is, we think, worth a good deal, as a security against the evil to be guarded against; but the argument in this case, satisfies us, that it is not all the security which the party giving it,

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had it in his power to give, and, therefore, that it is not, by itself, sufficient. The parties calling for the deeds, might consent, in writing, that if the deeds were not duly returned, and, restored to the party producing them, they would waive all objections to the deeds, would admit them to be genuine, and would let the copies of them, deposited in Court, or any other secondary evidence of them, go as evidence in their place, to the jury. This consent, if entered into, would, it is obvious, be valuable security in addition to that of the bond. And we think it ought to have been exacted in this case.

The Court ought also, we think, to have set a reasonable time, for the return of the deeds. This time would depend on the nature of the case; and that, the Court could look into.

We think then, that this second objection to the granting of the order, was good.

The Court below in granting the order, doubtless followed views expressed in *Faircloth vs. Jordan*, (15 Ga. 512.) But, it must be borne in mind, that nothing except the *judgment* in a case, is a precedent; and the judgment in that case merely was, that the Court below *erred* in granting the order excepted to. The judgment therefore could not form a precedent for the *granting* of any order. Consequently, it could not form a precedent, for the granting of the order now in question.

The objections urged before us, in that case, against the granting of the order, were the same as those urged before us, in this case, against the granting of this order. They were, first, that the Court had no power to grant any such order; 2dly, but that if it had power to grant some such order, it had no power to grant any such order, without exacting security against the order's working harm. The first of these objections, we thought insufficient—the second, we thought, sufficient. But this second objection, was general, that the order ought not to have been granted, without the exaction of security of some kind. The objection did not

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suggest what this security should have been. The Court argued, that security of some kind ought to have been exacted. The Court, then, was put in this condition; it had simply to say, that the Court below ought to have exacted security, and not specify what security; or it had to suggest some particular sort of security, as the one that ought to have been exacted. The former was the course which in strictness, the Court was required to pursue, yet, as it thought, that an essay towards determining what would be proper security, might be of service, it pursued the latter course, and suggested the sort of bond taken in this case. The course was unfortunate, for it, probably, misled the Court below; although, that is not certain, for that Court might itself, without any prompting from this Court, have hit upon this very bond, as the security. The case presents a good illustration of the evils of *obiter dicta*, even when there is much to invite them.

The conclusion then to which we come, is that the security required by the Court was not all the security which it should have required; a conclusion precisely of the same sort, as that to which, we came in *Jordan vs. Faircloth*. And here, as there, we suggest what would, as it strikes us now, be the additional security required, viz: the consent aforesaid, with a reasonable limit, for the return of the papers. But here, we beg, that it may be kept in mind, that these suggestions, as to what would be the requisite additional security, are but suggestions—*obiter dicta*—and not decisions. There may be better security than this bond and what else we suggest. If so, that ought to be required in preference to them. The principle which is to guide, is the one before stated, viz: that the security to be required, is the best security of any sort, which it is possible to exact consistently with the practicable attainment of the end in view—the sending of the paper to the witness. The problem for every Court to which, an application for an order of the kind in

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question, is made, is, merely to determine, what will be the security that will satisfy this principle.

Judgment reversed.

McDONALD J. absent.

WILLIAM A. RAWSON, plaintiff in error vs. JOHN S. MCJUNKINS, defendant in error.

- [1.] A judgment in the hands of the assignee, is subject to all the defences to which, it was subject in the hands of the plaintiff.
- [2.] New trial moved for on the ground that the verdict was decidedly against the evidence—refused.

In Equity, from Webster county. Tried before Judge KIDDOW, at September Term, 1850.

This was a bill filed by John S. McJunkins against William A. Rawson, assignee, to enjoin proceedings on a *fit. fa.*, and for relief.

The bill alleges, that on the 25th December, 1851, one Abram Prim, borrowed of Sterling Evans due \$1,71200, and gave his promissory note, with plaintiff as his surety, due twelve months after date; that plaintiff was in no way interested in the consideration thereof. That at the April Term, 1852, suit was instituted upon said note, and at October Term, thereafter, judgment went against said Prim and plaintiff; but that plaintiff, not having appeared and made any special defence, and having signed said note without designated himself as surety, judgment went against both as principals, and execution issued accordingly. That various pay-

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ments were made on said *fi. fa.* by Prim. On 26th April 1853, Evans transferred the *fi. fa.* to Edward E. Rawson, who on the 23d May, 1853, transferred the same to William A. Rawson, the defendant. That just before the *fi. fa.* was transferred to defendant, Ed. E. Rawson agreed with Prim, in consideration of one hundred dollars, to give him indulgence on the same, till the next February, and that this was done without the knowledge or consent of complainant.

That at the time this indulgence was agreed to be given, Prim was solvent, and able to pay off said *fi. fa.*, but since that time he has removed from the State and carried off all his property. He moved off in 1853.

The bill further states, that after the making of said contract, Prim offered to pay off the balance due on said *fi. fa.*, if the defendant would give credit thereon for the one hundred dollars, paid as aforesaid for indulgence, which, defendant refused to do. That defendant has had the property of complainant levied on under said *fi. fa.*, and the same is advertised to be sold by the Sheriff.

The answer of defendant states, that he has no knowledge of the application to Evans to borrow money or of the consideration of the note, signed by Prim and complainant, and upon which said *fi. fa.* is founded. Knows nothing of Prim's solvency at the time judgment was obtained, but he certainly was in embarrassed circumstances. Admits that the note was signed, and judgment obtained, and execution issued as stated in complainant's bill. Admits the transfer of said *fi. fa.* as stated, but has no knowledge of any contract between Prim and Ed. E. Rawson, as to giving indulgence on said *fi. fa.*; denies that Prim ever offered to pay off the same; admits that the execution has been levied as stated.

The case was submitted upon the bill and answer, the evidence and charge of the Court, and the jury found for the plaintiff, and decreed a perpetual injunction of the *fi. fa.*, as to him.

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The defendant moved for a new trial, upon the following grounds:

1st. Because the Court erred in charging the jury, that if McJunkins was security on the original note, then if the defendant gave indulgence to him, for a consideration, without McJunkins' consent, he was released from further liability, although defendant purchased the *f. fa.* without notice that plaintiff was security. That if plaintiff was only security on the note, it was not necessary that defendant should have had notice of that fact, as he traded for the debt after it was due.

2d. Because the verdict was decidedly against the weight of evidence.

3d. Because the verdict is contrary to law and evidence.

The Court refused to grant a new trial, and defendant excepted.

E. H. BEALL; and SCARBOROUGH, for plaintiff in error.

B. S. WORRILL; and McCAY & HAWKINS, *contra*.

By the Court.—BENNING J. delivering the opinion.

Were any of the grounds of the motion for a new trial good?

[1.] The first ground was the charge of the Court. That charge we think, was right. The assignee of a judgment, holds it subject to all the defences to which, the plaintiff in it, held it subject. Such is the plain import of the statute. *Pr. Dig.*, 465. And so, it has been held by this Court, *Colquitt vs. Bonner*, 2 *Kelly*, 155.

The second ground was, that the verdict was, "decidedly against the weight of evidence."

A great question in the case was, whether the sum borrowed, \$1,600, was borrowed by Prim and McJunkins jointly—Prim receiving of it, \$1,200, and McJunkins \$400; or

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whether, the sum was borrowed by Prim separately—he receiving of it, the whole \$1,600, and afterwards, himself lending \$400, to McJunkins. It seems clear, that McJunkins obtained \$400, of the \$1,600, one way, or, the other.

One of these two ways ~~the~~ being the way in which he obtained the \$400; the question is whether a verdict involving the assumption—that the last was the way, was “decidedly against the weight of the evidence.”

This question depends mainly, upon the import of the testimony of Prim, and that of his son. Prim, the father, was examined by interrogatories twice. On his first examination, what he stated, was this. “We signed the note jointly, but I received all the money, and applied it to my own use, the understanding between McJunkins and myself, was, that he was to be responsible for me to Evans, for the payment of said debt.” A verdict assuming that the last way was the one, would not be against this statement of Prim’s, but would be supported by the statement.

But what Prim, on his second examination, said, was this. “That he and complainant did borrow money of Sterling Evans.” “Complainant got four hundred dollars. Complainant has paid his share of the debt. The understanding was, at the time the money was borrowed, that complainant was to get four hundred dollars, and witness twelve hundred dollars. He does not now owe any part of the money still due on the *f. fa.* obtained by said Evans, on said debt. According to his understanding complainant did owe four hundred dollars, and that he paid it.”

What Prim, the father, thus states, Prim, the son, to some extent, corroborates. I : says, in substance, that he heard his father and McJunkins agree to borrow the money, and the agreement was this ; they were to borrow the money jointly, and that his father was to have \$1,200 of it, and McJunkins \$400. This conversation however, took place before the borrowing. This witness also says, that he recollects, that his father, in his first depositions, stated, that “they were

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jointly interested." Those depositions contain no such statement of his father. This witness further says, that McJunkins paid the \$400 which he got, to Prim.

Now the question is, can this last testimony of the father, and this testimony of the son, be reconciled with the first testimony of the father; or, if they cannot, were the jury bound to accept them, in preference to that?

An agreement between Prim and McJunkins, that the two should on their joint note, borrow \$1,600, of which McJunkins should take \$400, and Prim \$1,200, differs so little, in aspect and practical effect, from an agreement between the two, that one of them, Prim, should on their joint note borrow the \$1,600, and out of it, himself let McJunkins have \$400—that an ordinary person would run some risk of confounding the one with the other, and, therefore, of stating the one, when he means the other. That the witnesses meant to state the same thing, all the time, and, that that thing was, that Prim got the \$1,600 from the lender, and McJunkins got the \$400 from Prim, is pretty strongly to be inferred, from this, that McJunkins paid the \$400, not to Evans, but to Prim. Why should McJunkins pay the \$400, to Prim, unless he owed it to Prim, and how could he have owed it to Prim, unless he had borrowed it from Prim, and not from Evans.

We, then, are not prepared to say, that it was impossible for the jury to reconcile this evidence.

But even if we were, we are not prepared to say, that the jury were bound to accept the last testimony of the father, and the testimony of the son, in preference to the first testimony of the father.

The first testimony is strongly confirmed by a fact, which seems to be undoubted, the fact to which I have just referred, that McJunkins paid the \$400 to *Prim*, not to Evans.

That testimony is also confirmed by the conduct both of Prim and of McJunkins, in respect to the *fi. fa.* Prim was the one, who manifested all the interest in the *fi. fa.* It was

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he that paid usury, for indulgence ; it was he that wished, and offered, to pay up the whole *fit. fa.* on the terms of a relinquishment of the usury. McJunkins did nothing--said nothing.

Then, Prim, the son, says, that he recollects a statement of importance, as having been made by his father, in his first depositions and those depositions contain no such statement.

We are not satisfied, then, that, it is true, that the verdict was "decidedly against the weight of evidence."

But even if we were, it would not follow, necessarily, that we should be bound, to order a new trial. The new trial Act of 1854, says; that "the Judges of the Superior Courts, may have the power to exercise a sound discretion, in granting new trials, where the verdict may be decidedly and strongly against the weight of evidence;" "and the Supreme Court shall have power to revise and control such discretionary power in the Superior Court." *Acts*, 47.

Thus, it is seen, that granting a new trial, even where such a ground as this, is true beyond question, is but a mere matter of discretion.

And looking at one fact in this case, we hardly think it would have been an abuse of discretion, in the Court below, to have held this ground insufficient, even if the ground were true beyond dispute. That fact is this: Prim offered to pay up Rawson, if he would relinquish the \$100 of usury, Prim had paid for receiving indulgence till a certain time. That offer was made when about a third of the time given had run out. Rawson refused the offer. Prim ran away, and Rawson then turned upon McJunkins, who, in every interpretation of the testimony, was, at the time of Rawson's refusal of Prim's offer, bound only on Prim's account. In the face of such a fact as this, Rawson has no right to expect to receive any thing beyond what the law, taken in its utmost strictness, will give him. He may have what is nominated in his bond ; no more.

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There was some conflict in the testimony, on another point; viz, whether McJunkins consented to the indulgence; but there was as much evidence, perhaps, on the one side of that question, as there was on the other.

As to the third and last ground, it must of course be true, that that is not sufficient, if it be true, that the second is not.

Judgment affirmed.

27	438
95	584
27	438
120	803

WILLIAM TAYLOR, et al., plaintiffs in error, vs. MOSES H. BALDWIN, et al., defendants in error.

Crabb sold to Baldwin, a lot of land, and gave Baldwin his bond, conditioned to be void, if he should make to Baldwin, a good title to the lot, when Baldwin paid to him \$150, which payment was to be made by the 25th of December. Baldwin gave Crabb his note for the \$150, payable at the time aforesaid, and went into possession of the land. At the end of some three years, ejectment was brought against Baldwin's tenant or assignee, by Crabb, or his assignee; and then, Baldwin, and his assignee, filed a bill against Crabb, and his assignee, for the specific performance of the contract of purchase, and tendered the purchase money, and the bond for titles. Crabb never offered to return the note for the purchase money, until he answered the bill; nor did he otherwise manifest any dissatisfaction at the course of Baldwin until the ejectment.

Held, That time was not of the essence of the contract of purchase; and, that Baldwin, though failing to pay the purchase money on the 25th of December, had still a reasonable time, within which to pay it, after the commencement of the ejectment.

In Equity, in Randolph Superior Court. Tried before Judge KIDD, at November Term, 1858.

This bill was filed by Moses H. Baldwin, and Sidney C. DuBose, against Benjamin Crabb and William Taylor, to

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enjoin an action of ejectment, for specific performance, relief, &c.

The bill states, that on the 9th October, 1847, Baldwin purchased from Crabb, lot of land No. 142, in the 5th district of said county, giving to Crabb his note for the purchase money, one hundred and fifty dollars, due 25th December thereafter, and received from Crabb his bond for titles, to be executed and delivered upon the payment of said note; that Baldwin went into possession of the lot, and made improvements, and continued in the possession thereof, until December, 1850, when he sold the lot to complainant, DuBose, who went into possession, and has remained in possession ever since; that while DuBose was thus in possession, William Taylor, with notice of complainant's occupancy and claim, purchased it from Crabb, and has brought his action of ejectment for the recovery of the same.

The bill further states, that in March, 1851, Baldwin tendered the purchase money, with interest, and demanded titles from Crabb, which he refused. The bill prays that the action of ejectment be enjoined; that Crabb's deed to Taylor, be declared null and void; and that Crabb be decreed to make good and valid titles to complainant, upon the receipt or tender of the purchase money and interest.

The answer of the defendants admits the statement of the bill, as to the purchase of the land, by Baldwin, from Crabb, in 1847. But the defendants insist that said sale was conditional, and that in the event that the purchase money was not paid by the 25th December, 1847, then said sale was to become void, and of no effect; that said purchase money was not paid when it became due, and complainant (Baldwin) was a stranger to Crabb, living in a distant county, (Henry) and of whom, or whose solvency, he knew but little; denies that Baldwin went into possession; admits that Taylor bought the land from Crabb in December, 1850, without notice of any superior claim or title, by complainants, or either of them; that DuBose never had posses-

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sion of said land, and there was no pretence that he had bought the same, until after Taylor bought from Crabb; and that Baldwin had never cultivated any part of the lot, but had built a negro house, or some other small building on said lot, near to where he lived, on an adjoining lot; admits that Baldwin did make a tender, and demand titles, but it was long after the land had been sold to Taylor, and after the ejectment suit was commenced.

By consent, the action of ejectment, and the equity cause, were tried together. The bill and answer were read. Complainants introduced a witness, who proved that sometime after Baldwin's purchase, he built some negro cabins a few yards over the line, on this lot No. 142; any person who knew the lines, could have discovered that the cabins were on the lot. Taylor lived on a lot cornering with lot No. 142, and if he knew the lines, would, in all probability have known that the cabins were on it. Heard Crabb say he had made Baldwin a limited bond; that if the money was paid at the time it was due, 25th December, 1847, he was to have the land, and if not punctually paid, it was to be no trade, and the land was to belong to him (Crabb). DuBose was in possession when the action of ejectment was commenced; there had been as much as forty acres cleared, and was worth two dollars and fifty cents per acre, for rent.

1st. Defendants offered in evidence the original plat and grant, from the State to Robert H. Elliott; dated 16th December, 1837, for said lot.

2d. A deed from Elliott to Benjamin Crabb, to said lot, dated 27th April, 1846.

3d. A deed from Crabb, to William Taylor, dated 8th December, 1850.

1st. The Court charged the jury, that if they believed that Taylor was an innocent purchaser, without notice of Baldwin's purchase, or possession, then he is entitled to recover the premises in dispute, and rent therefor as proved.

2d. That if, from the answers, and other evidence, they

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believed that the copy bond attached, as an exhibit to the bill, is a true copy of the bond from Crabb to Baldwin, and that Taylor, at the time he purchased, had notice of Baldwin's former purchase and possession, and that he had tendered the purchase money, with interest, within a reasonable time then they ought to find, that upon his payment of the purchase money and interest, that Crabb execute and deliver to him a deed for the premises, and that Taylor's action of ejectment be perpetually enjoined. The Court being of opinion that the terms of the bond for titles, did not annul the contract, if the money was not paid on the day it was due, but that the vendee had a reasonable time afterwards, within which to pay, and call for titles. To which charge defendants excepted.

The jury found for the complainants—enjoining perpetually the action of ejectment, and that upon the payment of the purchase money, with interest, to Crabb, that he execute titles to Baldwin.

Whereupon, defendants tender their bill of exceptions, assigning as error, the charge of the Court, and the verdict aforesaid.

Hood & Robinson, for plaintiff in error.

DOUGLASS & DOUGLASS; and **E. H. BEALL**, *contra*.

By the Court.—**BENNING J.** delivering the opinion.

The question is, whether, the second charge of the Court was right? That charge amounts to this, that time was not of the essence of the contract; that, although, Baldwin, did not offer to pay the purchase money on the day it fell due, yet, the contract of purchase, still subsisted, and he had still a reasonable time within which, to pay that money. Was this charge right?

The general principle, no doubt, is, that, in equity, time is not of the essence of the contract. That this is true of

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mortgages, and bonds with penalties, is familiar doctrine. Indeed, it is true, at law, of bonds with penalties; and, we may say, also of mortgages, in this State, for in this State, we may, if not must, foreclose mortgages at law.

And I think it doubtful myself, whether, the conclusion to be drawn from the English authorities, as they at present stand is not, that time is in no case of the essence of the contract. I think it certain, that they, at least, do not go further than this,—that, it is possible so to frame a contract, that time shall be of its essence.

Conceding, however, that a contract may be so framed, that time shall be of its essence, the question is, whether the contract in the present case, was so framed.

What is the test? This, I suppose, we may say, that the words shall be such, that they clearly show the *intention* to be, that time shall be of the essence of the contract. 2 *White & Tudor.*, *Lead. Cas.* 19; and what words will be sufficient for this? Words, at least, as strong as these, "that the agreement shall be void, unless the purchase be completed on a certain day." 2d *Ibid.*

Are there any such words in this agreement? There are not. This agreement is evidenced by a bond for titles, and the condition of that bond, is as follows: "The condition of this obligation, is this, that if the said Benjamin Crabb shall make, or cause to be made, to the said Baldwin," "a good and sufficient title" "to lot No. one hundred and forty-two," "when the said Moses F. Baldwin shall have paid, to the said Crabb, the sum of one hundred and fifty dollars, which payment is to be made by the twenty-fifth of December, that then the above bond or obligation, shall be null and void, otherwise to remain in full force."

There is nothing in these words, importing that the contract of purchase was to be void, if the purchase money was not paid on the appointed 25th of December. They merely say, that the vendor's *bond* shall be void, when he makes a title; and, that he must make a title, when the purchase money is

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paid, and, that the purchase money is to be paid on the 25th of December. They do not go further, and say, that if the purchase money is not paid on that day, the contract of purchase is to be void.

We think, then, that these words, taken by themselves, are not sufficient, to show it to have been the intention, that the contract of purchase was to be void, unless the purchase money was paid on the 25th day of December.

And this view from the words, is confirmed by the conduct of the parties. Baldwin, the purchaser, went into possession at the time of the purchase, and he, and his assignee, DuBose, have remained in possession ever since.

In this conduct, Crabb and his assignee, Taylor, acquiesced, until the bringing of the ejectment, which was brought only a short time before the commencement of the bill. They did not complain; they did not demand re-possession of the land, or, of the bond for titles; they did not offer to return the note given for the purchase money, until they came to answer the bill. All this goes to show, that the parties, themselves, interpreted their contract, as not meaning, that time was to be of its essence.

We think, then, that the Court was right, in the part of its charge, in which, it told the jury, that time was not of the essence of the contract.

Was the Court also right in the other part of its charge, in which it told the jury, that Baldwin was entitled to a reasonable time within which, to pay the purchase money? We think so. This part of the charge, was but a corollary from the first part. So, if that was right, this was, of necessity, right. This, indeed, was, I believe, not disputed.

The first charge was in favor of the plaintiff in error. The two charges are all the decisions stated in the bill of exceptions.

There was no motion for a new trial. Therefore the action of the jury cannot come before this Court, consequent-

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ly, there can be, for this Court, no further question in **this case.**

Judgment affirmed.

McDONALD J. did not preside in this case, being absent on account of illness.

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SAMUEL H. CAUSEY, ex'or, plaintiff in error, vs. WILEY, BANKS & CO., and others, defendants in error.

- [1.] It is competent to prove a fact which tends to establish a matter not directly in issue, but which when proven, may be entitled to some weight, on the trial of the main issue between the parties.
- [2.] Facts which came to the knowledge of a witness, by reason of his being connected with the case as attorney at law, cannot, under the statute, be given in evidence by him.
- [3.] If there be legal capacity, and no imposition or fraud, a contract of suretyship is binding; but weakness of capacity on the part of the surety, and the fact that it is a contract of suretyship, may be considered on the issue of fraud in procuring it.
- [4.] A charge to the jury, that "fraud is not to be presumed, but must be proved by those alleging it," unexplained, is not a legal charge in a case in which there is evidence of facts and circumstances tending to prove fraud.

In Equity, in Crawford Superior Court. Tried before Judge LAMAR, at September Term, 1858.

This was a bill originally filed by Lemon M. Causey, against Wiley, Banks & Co., and others. The complainant subsequently dying, his executor, Samuel H. Causey, was made the party complainant, in whose name the cause proceeded to a hearing.

The object of the bill was to relieve complainant from liability on three promissory notes, each for \$1,200 00, given to Wiley, Banks & Co., signed by William J. Causey, as princi-

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pal, and the said Lemon M. Causey, as security, on the ground that said Lemon M. was induced to sign said notes, as surety, by the false and fraudulent misrepresentations of defendants. Complainant was the father of said Wm. J., and the bill alleges that "owing to his bodily and mental infirmities, brought on by a stroke of paralysis, under which he labored and languished for eighteen months or thereabouts, previous to the time of signing said notes," most of complainant's business was in the hands of his son, the said William J.

The case was heard upon the bill, and answers and proofs.

The jury, under the charge of the Court, found for the defendants; whereupon, complainant moved for a new trial, upon the following grounds, viz:

1st. Because the Court erred in admitting the testimony of Nicodemus Andrews, and in overruling plaintiff's objections thereto, viz: that it was irrelevant, and was *res inter alias acta*, not tending to illustrate the real issues made by the pleadings.

2d. Because the Court erred in admitting the testimony of Francis H. Murdock, and in overruling plaintiff's objections thereto, viz: that it was irrelevant in this, that the situation of William J. Causey, when he commenced business in 1849, did not tend to illustrate any idea made by the pleadings in the cause.

3d. Because the Court erred in admitting the interrogatories of James A. Miller, and in overruling plaintiff's objections thereto, viz: that the said testimony referred to a letter or letters which were not produced, or accounted for, or exhibited to the answers of defendants, or either of them; that the testimony related to a transaction wholly and entirely void, it being an attempt to make Lemon Causey liable for the debt of another, without any writing signed by said Lemon, or another authorized by him, charging him with the payment of such debt, and because if admissible, notwithstanding the foregoing objections, it was irrelevant, and rela-

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ted to a transaction and credit, other than, and wholly distinct from, the debt or demand now in controversy.

4th. Because the Court erred in admitting the testimony of Harrison H. Collier, and in overruling plaintiff's objection thereto, viz: that the same was irrelevant.

5th. Because the Court erred in admitting the will and codicil to Lemon Causey's will, said codicil dated 18th July, 1853, and in overruling plaintiff's objection thereto, viz: that the same was irrelevant, and tended to illustrate no issue made upon the pleadings.

6th. Because the Court erred in admitting the deed from Lemon Causey to Samuel H. Causey, John Causey, Littleberry Causey, and James M. Sanders, dated 17th May, 1853, and in overruling plaintiff's objection thereto.

7th. Because the Court erred in rejecting the testimony offered by Green P. Culverhouse, Esq., to prove the contents of certain interrogatories which had been sued out in the case for Elizabeth Walker, had been read on a former trial, the said Elizabeth having been proven to have died since said former trial, and he, the said Green P. Culverhouse, having stated that he was counsel in this cause, acquired his knowledge of the contents of said interrogatories during his relation as counsel to the cause, and as he believed, in consequence of that relation, as but for that fact he did not think he should have paid attention to the reading of said questions and answers in open Court, or should have read them out of Court, as he had frequently done, though he was present and heard them read on the former trial in open Court, the plaintiff also stating that he had no other witness that he knew of, by whom he could prove the contents of said interrogatories and answers, and the testimony therein given having been admitted to be material.

8th. Because the Court erred in stating in the presence and hearing of, and to the jury, in response to a question propounded by one of respondent's counsel, while addressing the jury, that that portion of Montfort's answer to complain-

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ant's amendment, in the words following, viz: "this defendant further answering, saith, that he had no reasons to believe then, nor does he now believe, that the said Lemon M. Causey, at that time, from the infirmity of age, disease or other cause, either mental or bodily, was incapable of knowing his liability in signing said notes," &c., was directly responsive to the allegations in said amendment. [Abandoned.]

9th. Because the Court erred in charging the jury, as follows: "I am requested by the defendant's counsel to charge you as to the consideration of this contract. All I have to say as to the consideration of the contract for which these notes were given, is this, that it was lawful for L. Causey to become security to his son for the payment of these notes, and if he had the legal capacity to contract, that no equitable incapacity can be alleged so far as a want of consideration is concerned. But few securities are ever benefitted by incurring such liabilities, but if done voluntarily and without fraud, they are nevertheless liable. The authorities read by complainant's counsel, as to inadequacy of price, and in case of gross and palpable inadequacy, in which equity will supervene and relieve, only establishes the principle that a Court of Equity will lend its aid in relief of such cases from the presumption of fraud which arises, as no man would be presumed to enter into such contracts, unless fraud or imposition was practiced upon him, the consideration being but of little or no inducement to do so."

10th. The Court erred in all that portion of its charge, relating to the weak and imbecile condition of complainant's mind, and the purpose for which evidence of his mental state was admitted, and the influence it should have upon the jury, and in narrowing the issue made by the pleadings to a question of fraud, or no fraud—thereby excluding the jury from a consideration of the question of undue influence, and the circumstances growing out of the confidential relations existing between some of the parties.

11th. Because the Court erred in referring in general terms

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to the authorities read to the Court from Story's Equity, by complainant's counsel, and in not reading over the sections so read by complainant's counsel, and expounding them to the jury, and in adding to this part of his charge, "but the Court also charges you, that fraud or no fraud is also one of the controlling elements of the case."

12th. Because all those portions of the Court's charge, relating to fraud, weakness of mind, and inadequacy of consideration, are general and abstract, not applied to the particular facts and circumstances of the case, and well calculated to confuse and mislead the jury.

13th. Because the verdict of the jury is contrary to law and equity.

14th. Because said verdict is against evidence, and without evidence to support it.

15th. Because said verdict is decidedly and strongly against the weight of evidence.

The Court overruled the motion for a new trial, and complainant excepted.

CULVERHOUSE & ANSLEY; GEO. W. NORMAN; and S. HALL, for plaintiff in error.

COOK & MONTFORT, *contra*.

By the Court.—McDONALD J. delivering the opinion.

[1.] This voluminous record presents points on the single issue, whether the original complainant was circumvented into the signature of the notes as surety for his son, William J. Causey. On the trial of an issue of that sort, great latitude is allowed in the admission of evidence; and circumstances, seeming to have little or no connection with the principal transaction, are often looked to, because, on a strict and close examination, they may throw light upon, and explain circumstances, which have a direct bearing upon it, and which are in evidence. Whether the explanatory circum-

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stances are sufficient to defeat the force of those in support of the main issue, is a question for the consideration of the jury. In questions of fraud, it is often necessary to enquire into the *quo animo* of the parties; and circumstances to elucidate that, may be given in evidence. It may be of consequence, too, to prove a knowledge of the party said to be practiced upon, of the existence of a certain state of things which is disputed by him; and circumstances tending, even remotely, to establish such knowledge, is proper evidence. That L. M. Causey took up a note signed by W. J. Causey and L. M. Causey, given the year before the matter in issue took place, taken in connection with the fact that W. J. Causey had conveyed property to L. M. Causey and others, to pay off such liabilities, is admissible on the question whether L. M. Causey knew of the pecuniary embarrassments of W. J. Causey, however valueless its influence may be on that part of the issue which related to the conduct of the parties in procuring the signature of the intestate of plaintiff in error to the notes.

So it may be said in regard to Murdock's testimony. He proved that W. J. Causey was poor, but not that he was insolvent. Though poor, he purchased a stock of goods, and gave a mortgage, but there is no evidence of antecedent debts. But it is evidence to be considered, that he commenced business years before, without means, and is only admissible to prove, inferentially, that his father had knowledge of his circumstances at the beginning. It is true, that it is slight evidence that he continued to be solvent.

The evidence of Miller proved the existence of a letter, but not its contents, and is only admissible as evidence of the knowledge of L. M. Causey that his son was then without means. There is nothing in the evidence of Miller, certainly, to prove the existence of a legal or moral obligation on the part of L. M. Causey, to pay the debt in question, and it could not have been admitted for any such object. The presump-

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tion is against Miller's having written such a letter as would fix a liability on him, and if he did not, the request of L. M. Causey was not complied with. For the same reason, the evidence of H. H. Collier ought to have been received.

[2.] The testimony of G. P. Culverhouse was inadmissible by the terms of the statute, and ought to have been rejected, as it was.

[3.] There is no error in the charge of the Court, in regard to the consideration necessary to support a contract of suretyship. If there be legal capacity, and no imposition, such contract is binding. On the issue of fraud or no fraud in *procuring the contract*, weakness of capacity, combined with the fact that it is a contract of suretyship, is entitled to consideration.

The prominent grounds of complaint, of the judgment of the Court below, are to be found in the 10th and 12th grounds of the motion for a new trial, and amount together, to an allegation of a want of appositeness in the charge of the presiding Judge, to the facts and circumstances of the case, as in evidence before the jury. The plaintiff's counsel relies, in support of his cause, on the principle, that although weakness of mind, short of legal incapacity to contract, is not sufficient, of itself, to invalidate the note, yet, very slight circumstances of fraud or imposition, are sufficient to set it aside, and that the Court ought to have given the jury more explicit instructions upon that point. The Court charged the jury, in substance, that in proportion to the mental infirmity of the party, he is to be supposed to be less capable of resisting importunity, and of guarding himself against the circumvention and machinations of those who meditate a fraud upon him, and that under that view of the case, if L. M. Causey was competent to contract, he was liable on the notes, and should be decreed to pay them, unless they should believe, from the evidence, a fraud was practiced on him, in the procurement of his name, as security on the notes, by Wiley, Banks & Co., or Theodo-

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rick N. Montfort, the attorney at law, or some other person, with their knowledge or concurrence, and it is a settled principle that fraud is not to be presumed, but must be proved by those alleging it.

We think that this charge was too general, and not sufficiently explicit, as to the legal and equitable principles applicable to the case made by the bill, answers and proof, and especially, in instructing the jury, without further explanation, that "it is a settled principle, that fraud is not to be presumed, but must be proved by those alleging it." It was in proof, in this case, that Lemon J. Causey had been a long time afflicted with paralysis, or dead palsy, at the time he signed the notes as security for his son; some of the witnesses thought him capable of attending to ordinary business understandingly, while others believed him to be incompetent. The defendant's, creditors of William J. Causey, had heard of his embarrassments, and so well satisfied were they, that their debt was in jeopardy, that it was considered worth a trip by one of them, from Charleston to Crawford county, in this State, to attempt to secure it. He went to Knoxville, accompanied by his attorney from another county, and had an interview with the debtor, William J. Causey, who was a favorite son of his paralysed father; the creditor, the attorney, and the son, after an interview in Knoxville, went together to the house of the father, and soon induced him to sign the notes as security; the son at the time, being utterly insolvent. The imbecile father said at the time, and in the presence of the parties, according to the answers, after the notes had been signed by him, that it was the enemies of his son who had circulated reports injurious to his credit; but this declaration, indicated that he believed, at the time, that his son was solvent.

The Court, on the hearing of such a cause in equity, should give in charge to the jury, the principles on which Courts of Equity act, in reference to cases of this sort. "When the party executing an instrument, is a weak man, and liable to be

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imposed upon, the Court will look upon the circumstances, and the nature of the transactions, with a very jealous eye, and will very strictly examine the conduct and behavior of the persons, in whose favor it is made. If it see that any acts, or stratagems, or any undue means have been used;" "if it see the least spark of imposition at the bottom; or that the donors," (security here) "is in such a situation with respect to the donee," (the principal in the note here) "as may naturally give an undue influence over him; if there be the least *scintilla* of fraud in such a case, the Court will, and ought to interfere." *Hill on Trustees*, (154) 2d Am. Ed.

In the case of *Griffin vs. Deveulle, and others*, reported in the appendix to the 3d vol. of *Wooddison's Lectures*, Lord Chancellor (Thurlow, I believe it was) remarked that "the Court would not set aside the voluntary deed of a weak man, who is not absolutely *non compos*, nor any deed of improvidence or profuseness, for these reasons merely, when no fraud appears, as was laid down by Sir Joseph Jekyll in *Osmond and Fitzroy*; but, that Sir Joseph Jekyll might have been pleased to add, that from these ingredients there might have been made out and evidenced an inference of fact, that there was fraud and misrepresentation used." The learned Chancellor seems to have laid down the sound rule, and the only rule which can protect, effectually, weak men from the machinations of artful men of superior mind, viz: that upon proof of weak mind, and that the instrument was executed without consideration, or was improvident or profuse, fraud would be inferred, and to rebut it, proof must be made that it was the voluntary act of the party himself, unmoved by the words or conduct of the party taking the benefit under it.

The latter part of the charge under consideration unexplained, may have misled the jury, and in all such cases, we hold that an explanation should be given, to-wit: that fraud may be inferred from circumstances. It may be proved un-

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questionably, like any other charge. Men may be convicted of capital offences upon circumstantial evidence. Fraud also, may be proved by circumstances, but it is not to be presumed. This principle may be illustrated in a manner to elucidate the law of this case: A. being a man of powerful mind, trades with B., a person of weak and impaired mind; he purchases property from him, and pays an inadequate price; this is proven, and the evidence stops here. Fraud is not to be presumed, for a man of strong mind may sell property for greatly less than its value, and may have sufficient reasons for it, but if it be shown that B. was a person of weak mind, and easily imposed on, fraud may be presumed from the combination of the two circumstances, strength of mind on the one hand, and weakness of mind on the other, and the great inadequacy of the price paid for the property. The proof of these circumstances alone, would throw on the person taking a largely disproportionate benefit under the contract, the necessity of making proof that there was nothing in his conduct or behavior toward the party with whom he made the contract, showing fraud; that there was nothing of imposition, influence or encouragement, to trade, &c., &c.

In the case of *Chesterfield vs. Jansen*, 2 Vesey, Sr., 155, Lord Hardwick enumerates several species of fraud, and the law on the subject, summarily, which as it is short, I will extract. "1st. Fraud arising from facts and circumstances of imposition, which is the plainest case. 2d. Fraud may be apparent from the intrinsic value and subject of the bargain itself, such as no man in his senses, and not under delusion, would make, on the one hand, and as no honest or fair man would accept on the other; which are inequitable and unconscionable bargains, and of such, even the common law will take notice. A third is such as may be presumed from the circumstances and condition of the parties contracting; and this goes further than the rule of law, which is, that fraud must be proved, not presumed; but it is wisely established in

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a Court of Equity, to prevent taking any surreptitious advantage of the weakness, or necessity of another, which knowingly to do, is equally against conscience, as to take advantage of his ignorance. A fourth kind of fraud may be collected and inferred in the consideration of a Court of Equity, from the nature and circumstances of the transaction, as being an imposition and deceit, on other persons not parties to the fraudulent agreement." The law upon this subject is as fully stated in this extract, as it can be found in the same compass, any where, and if the principles there laid down are analyzed, it will be found, that fraud may be established by circumstances, as well as by positive proof. Indeed, like most crimes, fraud can be established, generally by circumstances only; for when men determine, deliberately, to commit a fraud, they would scarcely avow their purpose; they would rather lay their plans so adroitly as to avoid detection, and the worst frauds can often be searched out, only by circumstances pointing, more or less, directly to the object accomplished. The charge of the Court that "fraud is not to be presumed, but must be proved by those alleging it," is no doubt correct in a case to which it applies; but, in a case where either facts or circumstances tending to establish fraud, are in proof, it cannot apply. To say that fraud is not to be presumed, is equivalent to saying that it is not to be supposed to exist without proof, either positive or circumstantial. Such an isolated charge, without explanation, to do away its positive effects, cannot apply to any case where there is evidence to prove fraud, and the jury are not left to bare presumption, without facts or circumstances to support it, to set aside the alleged fraudulent transaction. In looking through this case, such facts and circumstances, we are bound to say, are in proof, as to call for a charge of the Court to the jury, that they might consider the facts and circumstances, to determine the issue of fraud or no fraud. The charge as delivered by the Court, without explanation, was well calculated to make an impression on the mind of the

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jury, that in the opinion of the presiding Judge, if they found fraud in the case, it must be upon presumption alone. We are well satisfied that such was not the intention, but the absence, of such intention cannot vary the law of the case.

Judgment reversed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF THE STATE OF GEORGIA,
AT ATLANTA,
M A R C H T E R M, 1859.

Present—JOSEPH H. LUMPKIN,
CHARLES. J. McDONALD, }
HENRY L. BENNING, } Judges.

JOSEPH R. DUKES, plaintiff in error, vs. **ENOCH NELSON, ex-ecutor**, defendant in error. | ²⁷ ₁₁₇ ⁴⁵⁷ ₇₈₄

- [1.] That a vendee, (of a slave,) with warranty, sells without warranty, does not authorize the conclusion, that he *waives* his warranty.
- [2.] Although a person who holds a warranty of soundness of a slave, sells the slave without himself making a warranty of his soundness, yet, it does not follow of necessity, that he sustains no loss by the slave's unsoundness. That will depend on how much he gets for the slave, as compared with what he gave for the slave.
- [3.] A warranty of soundness, is not negotiable.
- [4.] A breach of the warranty, is matter defensive, in a suit for the price.
- [5.] [5.] If an agent buy a slave in his own name, giving his own note in payment, and taking a warranty to himself, he may, when sued on the note, set up a breach of the warranty in his defence.

Complaint on note, from Cass county. Tried before Judge Crook, at March Term, 1859.

This was an action by Enoch Nelson, executor of Hervey H. Nelson, deceased, against Joseph R. Dukes, on the following promissory note:

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On or before the first day of January, 1855, I promise to pay H. H. Nelson, or bearer, the sum of nine hundred and fifty dollars for value received, this December 25th, 1854.

(Signed,) JOSEPH R. DUKES.

The plaintiff read the note in evidence and closed.

The defence was, that the note sued on was given for a negro boy named Henry, which H. H. Nelson, plaintiff's testator, sold to defendant, and which negro he warranted to be sound, but which was unsound at the time of the sale.

Defendant first offered and read in evidence the bill of sale from plaintiff's testator, which was as follows:

ABBEVILLE DIST., So. Ca.

Received of Joseph R. Dukes, \$950, for the purchase of a boy named Henry, I warrant sound and healthy. This December 25th, 1854.

(Signed,) H. H. NELSON.

Upon this bill of sale, was the following endorsement: "1855, January 22d. I transfer this bill of sale to George H. Gilreath."

(Signed,) "J. R. DUKES."

It was admitted by plaintiff that the note sued on was given for the negro named in the bill of sale.

Defendant next proved by three physicians, that the negro died of a disease of the heart, called Hypertrophy, and that in their opinion, the negro had the disease at least one year before defendant bought him, and that he died from said disease, and that they would have given nothing for him.

Plaintiff proved by one physician and some other witnesses, that in their opinion, the negro was not diseased at the time of sale. He also proved by Jonathan Jordan, who was the father-in-law of defendant, that defendant informed him, witness, that A. Jefferson Weems, of Cass county, Georgia, had requested him, defendant, to make Nelson an offer for the boy, and at the request of defendant, witness went to

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Nelson and offered him nine hundred and fifty dollars for the boy, which he understood to be Mr. Weems limit. Nelson at first declined to accept this offer, but afterwards, a few days before Dukes left South Carolina, he sent the negro to him, accepting the offer. Dukes carried Henry to Cass county, early in January, 1855. Witness saw Henry a few days before he left—did not examine him; he appeared to be sound and healthy. In September, 1857, was at the house of defendant in Cass county. Henry was then dead and this suit had been commenced. In reply to a remark made by witness, that it would be hard for Nelson to lose the boy, defendant said he had nothing to do with the lawsuit; they had merely used his name as he had given the note to Nelson; that he had carried the boy to Cass county, for Mr. Weems, and while he was in his possession he saw no evidence of unsoundness.

Plaintiff then offered and read in evidence the following letter, written by defendant:

CASSVILLE, May 6th, 1856.

MR. ENOCH NELSON:

Dear Sir:—I received yours of the 2d of April—twenty-two days on the way. I would have written sooner but for circumstances, being from home, &c. You say you want the money for Henry. Now let me know the longest time you can wait for it; you are not in need of it, I presume. I have been a little pressed, paying for my land, and times a little hard. Henry died some time ago with the dropsy; he is no more. Now come out and buy land with us, and I will give you all the aid that you could wish, as I am acquainted. Let me hear from you; corn is plenty, pretty fair prospects for wheat; health is good; my family well, &c

(Signed,) J. R. DUKES.

It was further proved, that the negro Henry died in Weems' possession, and that he belonged to Weems when he died; that Weems bought him from Gilreath in September,

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1855; that Gilreath bought him from defendant on the day the transfer on the bill of sale to him bears date.

After the testimony closed, defendant requested the Court to charge the jury:

1st. That if the negro had the seeds of disease in him at the time of the sale to defendant, and afterwards the disease was developed, and the negro died of the disease, the defence is complete, and they should find for the defendant, if the negro was worthless at the time of the sale.

2d. That notwithstanding the transfer of the bill of sale, the defendant may set up as a defence to the action, a breach of the warranty of soundness contained in the bill of sale; and if the jury are satisfied that the negro was diseased at the time of the sale, and in consequence thereof, became worthless, and died, they should find for the defendant.

3d. That defendant had the right to set up this defence, notwithstanding he may have sold the negro.

4th. That it was immaterial whether Dukes bought the negro for himself or Weems, in either event he can set up the defence and if he has sustained it by proof, they should find for defendant.

5th. That if Dukes bought the negro for Weems, Weems may defend through him, especially if they believe the negro died in the possession of Weems.

Each and all of which, the Court refused to charge, and counsel for defendant excepted.

The Court charged the jury, that if Dukes bought with warranty from Nelson, and afterwards sold to Gilreath, and assigned the bill of sale without warranty, then he could not set up his unsoundness as a defence in this action, unless the negro was unsound at the time he bought him from Nelson, and Nelson knew him to be so. And that it was immaterial whether defendant purchased for himself or acted as the agent of Weems; that by parting with the bill of sale, without warranty, he waived his legal right to set up

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this defence, and in the absence of warranty by defendant, he could not avail himself of the defence relied on, unless the jury were satisfied that the negro was unsound when Nelson sold him, and that Nelson knew it.

To which charge counsel for defendant excepted.

The jury found for the plaintiff nine hundred and fifty dollars, besides interest and cost; and counsel for defendant, tenders his bill of exceptions, assigning as error, the charge and refusal to charge above excepted to.

WARREN AKIN, for plaintiff in error.

UNDERWOOD & SMITH, *contra*.

By the Court.—BENNING J. delivering the opinion.

The questions are: first, was the Court below right, in refusing the requests to charge? Secondly, was it right, in its charge?

The requests amounted to this; that, if there existed a breach of the warranty of soundness, made by Nelson to Dukes, the breach was a defence to Dukes, although he might have sold the negro, and transferred his bill of sale, containing the warranty; and this, whether Dukes, in buying from Nelson, did or did not, act as the agent of Weems.

The charge given was, in part, this; that, even if there existed a breach of the warranty, it would be no defence to Dukes, if he had sold the negro, and transferred the bill of sale, made to him, by Nelson, unless he sold the negro, with a warranty of soundness, made by himself; because if he sold the negro, and transferred his warranty, he “waived” his rights under the warranty, unless he himself made a similar warranty?

First, was this part of the charge right? Is it true, that if Dukes sold the negro, and transferred the warranty made

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to him, without himself making any warranty, he *waived* his rights under the warranty made to him? We do not think that it is.

[1.] An implication that a man has, by his mere conduct, waived a right, he insisting, that he has not, is a strong measure, and not to be resorted to lightly. The case in which such an implication is allowable, must be a case in which, his conduct has been acted on by another person who would suffer, unless the implication were made; and a case, one in which, the conduct was such, that a reasonable man might be excused for acting on it. Now, did any body act on the idea, that Dukes, by selling this negro, and transferring his warranty, and by not making any warranty himself, *waived* his rights under his warranty? Did Gilreath do so in purchasing as he did, from Dukes? Of what benefit could it be to him, that Dukes should waive his rights under his warranty? It could be of no possible benefit to him. It was possible, and probable, that a *transfer* of those rights to Gilreath, might be of benefit to him, but not, that a waiver of them could. Still more is all this true of Weems, who bought of Gilreath. The idea, that Dukes had waived the warranty, was not one that could, possibly, make any part of the inducement to him, to purchase of Gilreath. Indeed, this idea was one calculated, rather to deter both him and Gilreath, from purchasing, than, to incite either to purchase. If the warranty was waived by Dukes, it was gone, and they, both, were cut off from all chance of profiting by it; whereas, if it was not waived by him, they might think, that, as they would hold under him, they would be entitled to the benefit of his warranty. Nelson could not have acted upon the idea, that Dukes, by transferring his bill of sale, waived his warranty, for whatever he did, consisted in the sale to Dukes, which, of necessity, must have taken place, before the sale by Dukes. These three persons were all there were of whom, it was possible, to say, that

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they acted on the idea, that Dukes had waived his warranty. Consequently, as they did not act on the idea, it must be true, that the ground of waiver on which the Court put its charge, was not sufficient.

[2.] Was there any other sufficient ground on which the Court might have put this part of its charge? It was said that, as Dukes sold the negro without warranting his soundness, he could not have sustained any damage, by the fact, that the negro was unsound when he bought him. But whether this is true, or not, depends entirely on the price at which, he sold the negro. It might be, that he sold the negro at half price, and that this fall in the price, was caused by the negro's unsoundness. If this was the case, the unsoundness of the negro, caused him to sustain loss to the amount of half the price he paid for the negro. It is to be presumed, that he did sustain a loss to some extent; for, it is to be presumed, that an unsound negro sold without a warranty of soundness, will not bring the full price of a sound negro. We must presume, then, *prima facie*, that Dukes, although himself, not warranting the soundness of the negro, sustained some degree of loss by reason of his unsoundness; that he got for him, less than he gave. There is, then, no ground here for the charge.

[3.] Did not Dukes's transfer of his bill of sale, to Gilreath, carry all of his rights under the warranty to Gilreath? It carried none of them, to Gilreath. The bill of sale was not a transferable thing. This was decided by this Court, in *Broughton vs. Badgett*, 1 Kelly, 76; a case in every essential respect, like the present. There, it was held, that the warrantee retained his rights under the warranty, notwithstanding, that he had transferred his bill of sale containing the warranty, to the person to whom he sold the slave. Such was the decision.

I would not be understood as meaning to say, that there could not be a case in which, the vendee of personal property, might not be entitled to the benefit of a warranty made

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to his vendor. I can conceive of cases in which, the vendee would, in my opinion, be entitled to the benefit of a warranty made to his vendor. Certainly, however, the *legal* title to the warranty will remain, in all cases, with the vendor, as, a warranty is not a negotiable thing at law.

[4.] It was argued, that the only remedy for a branch of a warranty, is an *action* on the warranty; that such breach is matter that is not pleadable *in defence*, to an action for the price. And there are a few early cases that look this way. But they are not sufficient to stand a moment, against the cases on the other side. The cases on that side, are numerous; they go back in a long series, far into the past; failure of consideration being an old defence; they are not confined to any one place or country, but exist wherever the common law prevails; they have in their favor the whole of the argument from expediency, for they make one action, accomplish the work of two actions. We cannot yield to this argument.

[5.] Hitherto, I have been proceeding, with an eye to that branch of the evidence which made Dukes, a principal in the purchase of the negro. It is time to turn to the branch of the evidence which makes him an agent in the purchase; the agent of Weems. Supposing him to have acted, in the purchase, as the mere agent of Weems, was that a thing, to exclude him from the defence of a breach of the warranty? We think not. His acting as agent, if he so acted, was, as far as appears, unknown to the vendor, Nelson. It does not appear, that his principal's name was disclosed to Nelson. At any rate, Nelson's administrator, the plaintiff in the suit, has elected to treat him as principal, and he has made no objection to being so treated. This estops the plaintiff from saying, that he was not principal, and therefore, that the loss was not his, but was Weems's.

[5.] Again, suppose we exclude Dukes from the defence, on the ground, that he acted as agent; as the agent of Weems. In that case, we give the right to sue for the breach of the

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warranty, to Weems; and consequently, the only effect will be, that we make Dukes pay Nelson, Weems pay Dukes, and Nelson pay Weems. So, the loss will at last fall on Nelson. Why, then not let it do so at first? Why not let Dukes, when sued for the price, set up the breach of the warranty for the benefit of Weems, his principal? We see no reason why we should not. Of different routes in law, that route ought to be taken, which is the shortest, the quickest, and cheapest.

Upon the whole, then, we do not see any ground that, in our opinion, was sufficient to justify the part of the charge in question. What the Court should have charged, is, we think, about as follows: That a breach of the warranty, was matter which Dukes had the right to rely on, in his defence, and this, whether, in selling the negro himself, if he did sell the negro, he sold him, with, or without a warranty; that, if he sold the negro without a warranty, the measure of his damages, was the difference between what he gave, and what he got, for the negro; that if he was acting merely as the agent of Weems, then the measure of the damage, was the loss sustained by his principal, Weems; and that the note ought to be reduced by a sum equal to what the jury might find the damage to be.

From what has been said, it must be apparent, that we consider the requests as, in the main, proper. It is needless, therefore, to say anything further as to them.

Judgment reversed.

Godfrey vs Godfrey

**MAIDEN A. GODFREY, plaintiff in error, vs. JOHN T. GODFREY,
defendant in error.**

The evidence in support of an application for an order of publication, in a divorce case, was, the returns of the Sheriffs of two counties, showing that the defendant was in neither of those counties.

Held, That this evidence was not sufficient.

Divorce, from Gordon county. Decision by Judge CROOK, at chambers, January 15th, 1859.

Maiden A. Godfrey filed her petition against John T. Godfrey, her husband, for a divorce, on the ground of wilful and continued desertion. The petition alleges, that she was married to John T. Godfrey in the year 1851, in the county of Lumpkin, and that in 1854, they removed to the county of Gordon, where they lived together about ten months, when defendant abandoned her, and has never since returned, "but is now living in Lumpkin county, in this State;" and "that said willful and continued desertion has existed more than three years," &c. The suit was brought in Gordon county.

The original and copy petition and processes were forwarded to the Sheriff of Lumpkin county, who returned them with the following entry thereon: "Search made and the defendant not to be found." The original and copy were then placed in the hands of the Sheriff of Gordon county, the county of petitioner's residence, and from which, it was alleged, defendant had absconded. The Sheriff of Gordon county returned that defendant was not to be found.

Petitioner, by her counsel, then applied to the presiding Judge of the Circuit, at chambers, for an order of publication in the usual terms, in cases of absent defendants.

The Judge refused to grant the order on the following grounds:

1st. Because said order cannot be made at chambers.

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2d. Because there is not sufficient proof that defendant resides out of the State.

To which decision counsel for petitioner excepts.

M. FRANCIS, for plaintiff in error.

JOHNSON, *contra*.

By the Court.—BENNING J. delivering the opinion.

Did the Court below err, in refusing to grant the order for publication? We think not.

The divorce cases in which, the Court is authorized to grant orders of this kind, are cases in which, the defendants "shall be out of the limits of this State." *Cobb Dig. 224.*

Did the evidence in this case, show, that the defendant was out of the limits of this State? It did not, by any means. It merely showed, that he was out of two counties of the State.

We think, that the application ought to have been accompanied by more evidence than this—by, at least, the affidavit of the plaintiff, or, of some other person, stating her belief, (and the reasons for it,) that the defendant was out of the State.

Useless to consider the other ground.

Judgment affirmed.

JOHN B. ELROD, plaintiff in error, vs. GILLILAND, HOWELL & CO., defendants in error.

An Act of the Legislature repealing laws and parts of laws militating against that Act, repeals an Act having conflicting provisions, so far only as the two Acts are repugnant to each other.

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Ca. Sa. and Certiorari, from Murray county. Decision by Judge CROOK, at March Term, 1858.

John B. Elrod was arrested under a *capias ad satisfacendum*, issued at the suit of Gilliland, Howell & Co. The *ca. sa.* bore date 2d October, 1858 ; he was arrested, and on the 13th November, 1858, gave bond for his appearance at the January Term of the Inferior Court, to take the benefit of the Act of 1823, for the relief of honest debtors. At the January Term of said Court, Elrod appeared and moved the Court to be discharged, on the ground, that the 4th section of the Act of the General Assembly, passed 11th December, 1858, repealed the Act of 1823, and was, in effect, a discharge of defendant from imprisonment. The Inferior Court granted the motion, and discharged defendant from custody ; to which decision counsel for Gilliland, Howell & Co. excepted, and applied to Superior Court for a *certiorari*. Counsel for Elrod resisted, at chambers, the application for a *certiorari*, and the merits of the question being fully argued and considered, it was agreed that the decision of the Judge, upon the application for *certiorari*, should be regarded as a final adjudication of the cause, and to which either party might except.

The Judge ordered the *certiorari* to issue, holding that the judgment of the Inferior Court discharging defendant was illegal.

To which decision counsel for Elrod excepted.

J. S. P. POWELL, for plaintiff in error.

A. FARNESWORTH, *contra*.

By the Court.—McDONALD J. delivering the opinion.

The Act of 1823 is not absolutely and wholly repealed by the Act of December 11th, 1858. If it was, all causes proceeding under that Act would, of course, have to fall with it.

The Act of 1858 prescribes the mode of proceeding in ca-

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ses in which a writ of *capias ad satisfaciendum* shall issue, or may have been issued, after the passing of the Act. It does not apply to cases in which a writ of *ca. sa.* had been already issued, and the defendant had been arrested. Such cases are excluded by its terms. The fourth section of the Act repeals laws and *parts* of laws militating against that Act. If, therefore, there be a prior statute, having provisions conflicting with some part of the Act of 1858, but not with the whole of it, the conflicting parts of the law are repealed, and none other. There is no conflict in regard to arrests made under the Act of 1823, prior to the passing of the Act of 1858. The Act of 1823, then, is a good Act, so far as the Act of 1858 is not repugnant to it; and there being no repugnancy as to cases in which writs of *ca. sa.* had been issued under the Act of 1823, prior to the passing of the latter Act, the former Act stands good as to them. The case of the plaintiff in error cannot be supported on the principles here laid down.

Judgment affirmed.

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130 355

DANIEL R. MITCHELL, plaintiff in error, vs. JOSEPH J. PRINTUP, defendant in error.

A new trial will be granted when the verdict of the jury is so uncertain that it cannot be executed, or is expressed in such terms that an objectionable part cannot be set aside with justice to both parties.

Assumpsit, from Floyd county. Tried before Judge HAMMOND, at August Term, 1858.

This was an action by Printup against Mitchell. The jury returned the following verdict: "We the jury find for the

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defendant three hundred and fifty dollars, with costs of suit; and find further, that the plaintiff has one-half interest in the Buena Vista property, and entitled to one-half of the rent from the time Mrs. M. A. Choice left the property, up to the present time."

Plaintiff moved for a new trial, on the grounds, that the verdict was illegal, uncertain and void, and could not be enforced, and was contrary to law and evidence, and the charge of the Court.

After argument, the Court set aside the verdict, and granted a new trial, on the first ground in the *rule nisi*, to-wit: that the verdict was illegal and void, in this, that the latter part thereof is inconsistent with the first, and renders the whole a nullity. All the other grounds were overruled.

To which judgment granting a new trial defendant excepted.

AKIN; and SHROPSHIRE, for plaintiff in error.

UNDERWOOD & SMITH; and D. S. PRINTUP, *contra*.

By the Court.—McDONALD J. delivering the opinion.

There are nineteen grounds in the motion for a new trial. The Court granted a new trial on the first ground taken in the motion, viz: that the verdict of the jury is illegal and void, and cannot be enforced. This was an action on the law side of the Court, and there is no process known to, or used in, a Court of law, by which the verdict, as found by the jury, can be enforced. The suit was instituted for the recovery of a sum claimed to be due to the plaintiff from the defendant in the Court below, for work done, materials furnished, and cash advanced by the plaintiff to the defendant, in and about the business of the defendant. The defendant, amongst other things, pleaded a contract made by the plaintiff with the defendant, by which the plaintiff agreed to do

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all the work, &c., for half interest in certain property on which the work was to be done, and the plaintiff had done and performed the work *himself*, under said contract, and not for the defendant; and he pleaded further, a set-off, for cash paid by defendant to the use of plaintiff, &c., &c.

There was no plea of a deed made by defendant to plaintiff, for one half interest in the property, in payment of plaintiff's demand, under the special contract; nor did the defendant, in his plea, make a tender of a deed, with a *proferit in curia*, but there was evidence of the contract gone into very fully before the jury. We might say, that the verdict is against evidence, for the defendant certainly cannot be discharged by a verdict, until he pays the demand sued some way, or makes proof that the plaintiff is not entitled to recover. We do not perceive that he has done either by his pleadings or proof. If he sets up a special contract, he should plead and show performance, or an offer and readiness to perform on his part. It is sufficient for us to put our judgment on the same ground that the Court below awarded a new trial, which we do, and affirm his judgment. My brethren are of opinion that we can order a reversal of the judgment on terms; but the terms upon which the reversal is placed, depend so much upon the option of the parties, that it amounts to nothing more than a reversal by consent, dependent upon their voluntary execution of the verdict. Taking the whole case in all its parts, I am inclined to the opinion, that it is a very proper case for equity jurisdiction.

Judgment affirmed, but it may be reversed conditionally.

Bogle & Fields vs. Maddox.

BOGLE & FIELDS, plaintiffs in error, vs. **JAMES M. MADDOX**, defendant in error.

Bogle & Fields had an attachment on the land of Hunter. To this land a claim was interposed by Woods and others, who derived their title, from Maddox, who derived his title, from the same Hunter. Maddox sued Hunter, by petition, for the establishment of the deed made to him, by Hunter—alleging that it was lost. Bogle & Fields moved to be made parties defendant to this suit. The Court overruled this motion.

Hold, That the Court did right.

Petition and motion, from Catoosa county. Decision by Judge Crook, at November Term, 1858.

The facts of this case are as follows:

Bogle & Fields sued out an attachment against Edwin W. Hunter, which was levied upon a lot of land; and at the October Term, 1856, of the Superior Court of said county, recovered judgment, in said attachment, against Hunter. To this lot of land, claims were interposed by Archibald Woods, Mark Deadman and Samuel Plummer, severally, each claiming certain portions thereof.

This land, or the portions severally claimed by claimants, was conveyed to them by one James M. Maddox, and pending these claims, Maddox, at the instance of claimants, instituted proceedings to establish copies of a power of attorney, and a deed of conveyance executed by virtue thereof, the originals of which it was alleged were lost. The power of attorney, it was alleged, was made by Hunter, to one John Richards, authorizing him to sell and convey the land in dispute, and the deed executed by Richards, in pursuance of said power, conveying said land to Maddox. To this proceeding to establish said lost papers, Hunter and Richards were made parties defendant. And Bogle & Fields, at November Term, 1858, moved the Court, upon their petition setting forth the above facts, to be made parties defendants in said proceeding; the purpose and intention of the claimants,

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being, to use said copies, if established, on the trial of the claim cases; and if said papers were established and thus used, petitioners, Bogle & Fields, will be defeated in said cases, otherwise, they would probably succeed.

The Court refused the motion to make petitioners parties, and granted an order establishing said copy deed, and power of attorney, in lieu of the lost originals, to which decision counsel for petitioners except.

S. W. CARUTHERS; and C. D. McCUTCHEON, for plaintiffs in error.

CULBERSON & HACKETT, *contra*.

By the Court.—BENNING J. delivering the opinion.

Was the Court below right in overruling the motion of Bogle & Fields, to be made parties defendant, in the proceeding of Maddox against Hunter and Richards, to establish copies of the lost deed and power of attorney?

The relation which Bogle & Fields bear to that proceeding, is such as grows out of the fact, that they have, against Hunter, an attachment now in judgment, levied on the land covered by the lost deed. A similar relation to this, is borne to the proceeding, by each of the three claimants, for Maddox purchased the land from Hunter, and each of them, purchased a part of the land from Maddox. The question then is, do all persons who bear such a relation as this, to a proceeding of this kind, have the right, on their own motion, to cause themselves to be made parties to the proceeding? The answer to this question, must depend on what is the meaning of the latter part of the sixth section of the Judiciary Act of 1799, for that is all the law there is that bears upon the question. The Act of 1856, to provide a mode for establishing lost papers, does not contain any provision on the subject who are the proper parties to the suit for the establishment of

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them. *Acts of 1856*, 238. The words of the Judiciary Act which govern the question are the following; "and the said Courts respectively shall have power and authority to establish copies of lost papers, deeds, or other writings, under such rules and precautions as are, or may have been, customary and according to law and equity." *Pr. Dig.*, 420.

The "rules" to be observed were to be such as were "customary and according to law and equity"—that is, were to be such as were sanctioned by the three things, custom, law, equity. Perhaps, however, what was meant merely was, rules sanctioned by *equity*; there being, probably, neither custom nor law apart from equity, on the subject. Let us assume, then, that this was what was meant. This assumed, the question will be, is there any rule of equity, which, if this proceeding were a suit in equity, would allow Bogle & Fields, and persons bearing to the suit a similar relation to theirs, to make themselves defendants to the suit, on their own motion?

First, would a demurrer lie to such a suit, for want of such persons as parties to it? We hardly think so. In such a suit, the prayer would merely be, that a copy of the lost deed, might be established, and the relief would not go beyond the prayer. The case would be much like a case for the specific performance of a contract to convey; and as to that case, the general rule is, that the only persons required as parties to the suit, are the parties to the contract.

Secondly, but even if such a demurrer would lie, it might still not be true, that persons of this kind would have the right on their own motion, to become parties to the suit. A suit is an affair between the persons who are parties to it and their privies, and not an affair to affect any other persons. Whence then can other persons get a right to intervene in the suit? We do not see whence. If they have rights, they may assert those rights in suits of their own; and the ability to do this is all sufficient for them. In the case in hand the proceeding is a suit between Maddox on one side, and Hun-

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ter and Richards on the other. Bogle & Fields are merely creditors of Hunter. They therefore, are not his privies in that suit. Consequently, the judgment in the suit will not bind them. They will have the right to attack it, and show it, invalid, if they can. True it may be, that the judgment will be admissible, as *prima facie* evidence, against them, but, if so, it will be on the principle on which, the *fi. fa.* and judgment on which, a Sheriff's deed is founded, are admissible, in cases in which, such a deed is a link in the chain of title of one party or the other.

Thirdly, the usage has been to confine the *rule nisi*, as it concerns parties, to the persons who are parties to the lost papers to be established. And this usage is of long standing. Such a usage ought to have some weight in the interpretation of the words aforesaid of the Judiciary Act.

In *Turner vs. Joiner, et. al.*, (18 Ga. R. 370,) the lost deed was a Sheriff's deed ; and it was held, that the defendant in the *fi. fa.*, under which, the Sheriff made the deed, was a necessary party to the rule for establishing a copy of the deed. But he, in law, was really the principal maker of the deed ; the Sheriff being, in these cases, but the agent of the parties to the *fi. fa.*.

Upon the whole, then, we think, that the Court was right in overruling the motion.

Judgment affirmed.

Cabot vs. Yarborough, et al.

FREDERICK M. CABOT, plaintiff in error vs. **NATHAN YARBOROUGH, et. al.**, defendants in error.

Questions of contempt are for the Court treated with the contempt; and its decision ought to be final, except, perhaps, in the case in which, the decision shows an enormous abuse of the discretion.

Attachment for contempt, from Floyd county. Decision by Judge HAMMOND, at February Term, 1858.

Frederick M. Cabot, filed his bill in equity, against, Atkinson J. Hardin, Daniel F. Suryer, James M. Spullock, Nathan Yarborough, Dennis Hills, and William Johnson, praying, amongst other things, for an " injunction to be directed to the said defendants, their agent and attorneys, commanding and enjoining them, and each of them, to cease all further prosecution of a certain claim case in said Superior Court, and also, from selling, or otherwise disposing of" the claimed "property, and to cease from the further appropriation of your orator's one-third of the rents of said property to their own use, until the other and further order of this Honorable Court in this behalf."

The bill was filed the 5th August, 1858, and on the same day sanctioned by the Chancellor, and an injunction ordered to issue in the sum of one thousand dollars, "pursuant to the prayer in complainant's bill."

The injunction issued, directed to defendants commanding them, "that they, and each of them, their agents and employees, forthwith do desist their action of claim," &c., as mentioned in said bill of complaint, until the further decree of this Court."

Served on Yarborough, Hills, Johnson, Spullock, and Hardin, 15th October, 1858, and on Suryer, 15th March, 1859.

At the February Term, 1859, of Floyd Superior Court, complainant, Cabot, moved for a *rule nisi*, against Spullock,

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Yarborough, Johnson and Hills, to show cause why they should not be attached for a contempt of the Court, for violating said injunction. This motion was supported by the following affidavit of complainant:

GEORGIA, FLOYD COUNTY.

Personally appeared F. M. Cabot, complainant, who being duly sworn, deposeth and saith, that the bill filed by him was for the purpose, amongst other things, of restraining the defendants from "*selling or otherwise disposing of*" certain city or town property in the city of Rome, which property is described in said bill, and in a copy attached to said bill, as an exhibit, and to restrain said defendants from "*the appropriation of one-third of the rents of said property to their own use.*" "That the said James M. Spullock has sold two-fifths of said property to Jones & Scott, for one thousand dollars, and on the 12th January, 1859, executed a deed of conveyance therefor, and that he, deponent, is informed and believes that the said Johnson has sold one-fifth of said property for five hundred dollars, and that the said Yarborough and Hills have respectively rented the other two-fifths of said property, or the lower room for \$70 00, for each one fifth part thereof per annum, and that defendants have by said sales and rentals placed it out of deponent's power to get his third part of the rents of said property, to which he is entitled; placing the property out of the reach of deponent, so as to prevent him from enforcing his vendor's lien," &c.

Spullock answered that he had no notice of any injunction, prior to its service, as stated in the *rule nisi*, nor for some time thereafter, as the same, he thought, was served by leaving a copy at his residence. That he never intended to violate said injunction, but he acted under the impression that he was not enjoined from any thing more than prosecuting said claim case, and that he is advised, that such is the purport of said injunction. That he agreed to sell his inter-

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est, on the 2d September, 1858, and in pursuance of said agreement, he had conveyed the same by deed, not supposing that he was in any way thereby violating said injunction.

Yarborough answered, that he had rented his undivided fifth interest in said property prior to 1st September, 1858, which was before he was served with the injunction.

Wm. Johnson answered, that he did not understand that he was restrained by said injunction, from any thing more than proceeding in the claim case, pending in Court; that he sold his undivided fifth interest in said property on the 6th September, 1858, which was before he was served or had any notice of said injunction, and that it was not his intention to violate the injunction, either in its spirit or letter.

Upon the foregoing answers, the Court discharged the *rule nisi*, and ordered complainant to pay the cost of the proceeding. To which decision, complainant excepted.

MITCHELL, for plaintiff in error.

UNDERWOOD & SMITH, *contra*.

By the Court.—BENNING J. delivering the opinion.

Was the Court below right in discharging the *rule nisi*, on the cause shown by the defendants?

The question, whether there is a contempt of a Court; and the question whether, if there is one, it ought to be punished or ought to be excused, and other questions, as to contempt, are questions for the discretion and judgment of *that* Court. And there can be little danger, that a Court will fail in the duty of having itself sufficiently respected. Whatever decision then, it comes to, on such questions, ought to be final, at least, unless there is something in the decision to show a most flagrant abuse of the discretion. We do not see any thing of that kind, in the order discharging the rule in the

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present case. The showing as we think was quite sufficient.

Hence the judgment is affirmed.

Judgment affirmed.

**DAVID M. DAVIS & BERRY GAZZAWAY, plaintiffs in error,
vs. WILLIAM W. ALEXANDER, defendant in error.**

The reinstatement of a dismissed case will not be disturbed, when it appears that the plaintiff was not culpably negligent, and that the defence suffered nothing by the reinstatement.

Complaint, from Whitfield county. Decision by Judge TRIPPE, at October Term, 1858.

William W. Alexander brought suit (under the form prescribed by Act of 1847,) against David M. Davis, as maker, and Berry Gazzaway, as endorser of a promissory note. At the October Term, 1858, of Whitfield Superior Court, the case was called in its order for trial, and plaintiff failing to appear and prosecute his cause, on motion of defendant's counsel, the cause was dismissed, and an order regularly entered dismissing the same, with leave to defendant to enter up judgment for cost. A few days after this order was passed, and during the same Term of the Court, the plaintiff appeared by his attorneys, and moved to rescind said order, and to reinstate the case on the docket. This motion was supported by the affidavit of plaintiff, setting forth, that he had employed one B. S. Sterns, an attorney at law, to bring said suit, who died pending the same; that James A. Baird became the administrator of Sterns, who employed C. D.

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McCutchin, Esquire, a competent attorney at law, to represent the cases which Sterns was engaged; that pending said suit plaintiff had held defendants to bail, and Davis has since removed from the State, and the endorser is insolvent, and relying on the arrangement between the administrator of Sterns and McCutchin, plaintiff did not employ other counsel.

C. D. McCutchin, Esquire, testified, that he was only employed by Baird, the administrator of Sterns, in cases where the administrator furnished him the evidence; that no note, or other evidence, was ever placed in his hands, relative to this case, and he was therefore never employed in the same, and did not know that the case was pending.

The Court granted the motion, and counsel for defendants excepted.

JESSE A. GLENN, for plaintiff in error.

JOHNSON & JACKSON, *contra*.

By the Court.—BENNING J. delivering the opinion.

Was the Court below right in reinstating the case? We think that it was.

It does not appear, that the reinstating of the case, worked any detriment to the defendant's defence, if he had any; and it is not to be presumed, that, it did, as the reinstating happened at the same Term of the dismissal.

And it can hardly be said, that Alexander was guilty of culpable negligence. Doubtless, his understanding of what was the agreement between the administrator of Mr. Sterns, and Mr. McCutchin, was, that Mr. McCutchin was engaged to attend to *all* of the cases of Mr. Sterns. And the agreement was, in all probability, intended to cover Alexander's case; for the agreement taken as stated by Mr. McCutchin, extended to all the cases of Mr. Sterns, the administrator, might furnish him the evidence in. And no doubt, the ad-

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ministrator meant to furnish him the evidence in this case, for that evidence was but a promissory note. The administrator may have been negligent.

Judgment affirmed.

MACON & WESTERN RAIL ROAD, plaintiff in error, vs. WILLIAM N. McCONNELL, defendant in error. | ²⁷ ₁₂₅ ⁴⁸¹ ₄₀₆

When a railroad company has used a piece of ground as a wood-yard, for a long time, all persons building contiguous thereto, are chargeable with a knowledge of the fact, and of the right of the company to pile up wood upon any part of the premises, when it suits their interest or convenience to do so.

Assessment of damages, from Fayette county. Tried before Judge BULL, at September Term, 1858.

This was a proceeding under the statute, by William N. McConnell, against the Macon and Western Railroad, to assess and recover damages for burning and destroying "the dwelling house, kitchen, and kitchen furniture; smoke-house, corn-crib, ten barrels of corn, fencing and railing, work-shop, well-house, two leather trunks and contents, two bedsteads and bedding, two mattresses, sundry wearing apparel, one man's saddle, one side-saddle, a two-horse wagon and harness," belonging to McConnell, by the engine, or locomotive running on the Macon & Western Railroad to plaintiff's damage two thousand dollars. The fire was communicated by sparks from the engine, to a large pile of wood, belonging to the road, near plaintiff's premises, and from thence to the premises themselves, which resulted in

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their entire destruction, together with the property and articles above enumerated.

After the testimony was closed, the Court charged the jury that they must be satisfied, from the evidence, that the injury was caused by the carelessness or negligence of the defendant or its agents, or employees; that before plaintiff could recover, it was necessary that he should show negligence, or want of proper care and precaution on the part of the company; that all persons who build near railroads run a risk, yet they assumed no risk against the tortious acts of the owners or managers of the road; that the railroad company had a right to keep and use wood at its stations, yet it had no right, unnecessarily, to extend the wood-pile so far as to endanger plaintiff's property, when he had made his improvements, before the wood was hauled and thrown near his premises.

The jury found for the plaintiff fifteen hundred dollars, whereupon defendant excepted, and assigns as error:

1st. That said verdict is contrary to law and evidence, and without sufficient evidence, and that the damages found are excessive, unjust and unreasonable.

2d. That the verdict is contrary to the charge of the Court.

TIDWELL & WOOTEN, for plaintiff in error.

HUIE & CONNER; and CALHOUN, *contra*.

By the Court.—LUMPKIN J. delivering the opinion.

We find no fault with the charge of the Court, upon the question of negligence. We think that some modification of the opinion of the Court, is proper as to the relative rights of the road, and the contiguous proprietors of property. The charge, as given, was, "that the company had to keep and use wood at their stations, yet they had no right, unnecessarily, to extend their wood-pile far enough to en-

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danger the plaintiff's property, when the plaintiff had made his improvements before the wood was hauled and thrown near his premises."

The error in this charge is two-fold. It assumes, that there was proof to show, that the defendants had, "*unnecessarily*," extended their wood-pile; and secondly, it maintains, that, notwithstanding the wood-yard had been used ever since the railroad was completed, and that fact was notorious to all, still, if the company had not occupied this portion of the ground for wood, before the plaintiff built, they were responsible for fires and other casualties.

We hold, that all who build, knowing that this was a wood-yard, and of course, the right of the defendant to use the whole, or any part of it deemed necessary, must build in reference to this right, and consequently, erect their improvements further off. (One of the members of this Court goes further, and maintains that whether this ground had been appropriated as a wood-yard or not, yet being the property of the defendant, and a wood-pile not being a nuisance, the defendant had the right to pile up wood upon the whole, or any part of the ground, even to the boundary line which separated between the company and the plaintiff.)

Judgment reversed.

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WILLIAM J. KEITH, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

The Judge of the Superior Court has power, on examining and considering the evidence returned with a peace warrant, if it be insufficient to require the giving a bond, to discharge the defendant; and he has, moreover, the discretion to discharge him without the payment of costs, if, in his opinion, there was no foundation for the proceeding.

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Peace warrant, from Whitfield county. Decision by Judge TRIPPE, at October Term, 1858.

Upon the affidavit of Patrick C. McOwen, a peace warrant issued against the plaintiff in error, William J. Keith, and he was recognized to keep the peace, and to appear at the next Term of the Superior Court of Whitfield county.

At the Term of the Court to which said proceedings were returnable, counsel for defendant moved that he be discharged without cost, there being no return made of any evidence by the justice, except the affidavit upon which the warrant issued. The Court discharged defendant, but ordered him to pay the cost, and to this decision, counsel for defendant excepted.

JESSE A. GLENN, for plaintiff in error.

Solicitor Gen'l JOHNSON, *contra*.

By the Court.—McDONALD J. delivering the opinion.

The law makes it the duty of the Judge of an Inferior Court, or Justice of the Peace, by whom a bond and security of the peace are taken, to make a return of the bond, together with the affidavit and other evidence on which the bond was taken, to the next Term of the Superior, Inferior, or City Court, which may first thereafter hold their sittings, and if, on taking the case into consideration, and examining the evidence presented, the Judge shall be of opinion there was no sufficient ground for requiring the bond, he is required to cause the bond to be cancelled, and to discharge the accused; and if he shall be of opinion that there was no reasonable ground for requiring such bond, he may order and direct that the prosecutor shall pay all the costs and expenses of the proceedings. Cobb, 860. The officer taking the bond in the case before us, returned no evidence, except the affidavit of the prosecutor on which it was issued.

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The presumption is, that he had no other evidence before him, or he would have returned it. Magistrates requiring such bonds, have been in the habit of taking them on the single affidavit of the prosecutor, but by the Act of 1850, *Cobb*, S65, they are required to hear evidence, if offered by the defendant, to show that the proceeding was without foundation.

The presiding Judge in the Court below, had the right, upon the affidavit of the prosecutor, to refuse to mulct him in the costs and expenses of the proceedings, if upon that, he believed there was reasonable ground for suing out the warrant. He refused the application to dismiss the cause without payment of costs by the accused. It was a matter of legal discretion with him, and we do not see that he has abused it, and without such abuse we will not control his discretion.

Judgment affirmed.

DICKERSON LUMPKIN, plaintiff in error, vs. BURRELL JOHNSON, defendant in error.

The statute of frauds will apply to a verbal contract for the sale of land, unless there is part performance, or some matter, to prevent it from so applying.

In Equity, from Floyd county. Tried before Judge HAMMOND, at February Term, 1859.

This bill was filed by Dickerson Lumpkin, against Burrell Johnson, to compel the specific performance of an agreement for the sale and conveyance of lot of land, No. 212, in the

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twenty-second district, third section, of originally Cherokee, now Floyd county.

The bill in substance, states, that in the month of December, 1848, complainant was about to purchase said lands from one Paschal Brisentine, his brother-in-law, who was the owner thereof. Their agreement was, that complainant was to pay \$200 in three annual installments, and upon the payment of said purchase money, Brisentine was to execute titles to complainant. This contract or agreement was to be reduced to writing, and complainant was to give his notes for the purchase money; but before this agreement was consummated, Burrell Johnson, the father-in-law of complainant and of Brisentine, interposed, and proposed that he would advance the two hundred dollars to Brisentine for the lot of land, and take titles to himself, and would lease the premises to complainant, and give him four years to pay for the same, and at the expiration of that time, and on the payment of said \$200, with interest, he would convey said land to complainant. To this proposition, complainant assented. Johnson paid the \$200 to Brisentine, and received from him titles for the land—and, the bill alleges, the agreement between Johnson and complainant, was to be reduced to writing. That complainant went into possession and made improvements. Afterwards, learning that Johnson claimed the land as his own, he applied to him to reduce their agreement to writing. Some time after this, Johnson produced and tendered a lease, demising to complainants the premises for four years, and binding him to build a good dwelling house on the place, to clear thirty acres of land, and restricting complainant in the use of the timber, &c.; and merely adding at the bottom of the page, that "if complainant paid said Johnson for the said tract of land, he might then have the land," without naming the amount to be paid. That complainant refused to sign or enter into any such agreement, and Johnson refused to execute any other. Complainant then proposed to pay Johnson the \$200 which

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he had advanced to Brisentine for the land, and Johnson replied, that if complainant would pay him the same by 25th December next, thereafter, he would execute a deed to him for the lot. That at the time stipulated, he went to defendant and tendered to him the full amount of the purchase money, \$200, and demanded titles, but he refused to receive the money or to execute titles.

The prayer of the bill was, that defendant be compelled to perform said contract—to accept said sum of money and execute to complainant good and legal titles to said lot of land, agreeably to the terms and true intent of their agreement.

The defendant, in answer, admits that complainant did make a verbal agreement with Brisentine for the purchase of the lot in question, at the price stated in the bill, in three equal annual installments; the first to become due 25th December, 1849, and that bond for titles was to be given as stated in complainant's bill. That complainant and Brisentine are his sons-in-law, and knowing that Brisentine was anxious to raise some money for which he had immediate use, and that Lumpkin was an improvident man, and a bad manager, with a view to accommodate Brisentine, and to secure a home for his daughter, Mrs. Lumpkin, and her children, he sought both parties, and proposed, if it was agreeable to them, to advance \$200 to Brisentine for the lands, and to give Lumpkin four years to pay the purchase money and interest; that he would give him a lease for the land and a bond for titles. This proposition met the approbation of both parties, and was accepted by both. Defendant paid Brisentine \$200 and took from him a deed of conveyance for the land; that Brisentine by agreement of the parties, drew up a lease or instrument of writing to be executed by complainant and defendant, containing their contract, which complainant refused to sign. Defendant admits, that at the time this disagreement occurred, he did say that if he had his money back he would "get out of this fuss;" when

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Lumpkin said, "how long will you give me; two weeks?" Defendant replied, "Yes, till Christmas." But defendant denies that there was any contract or agreement to that effect. It was said in consequence of the vexation which complainant was giving him about the land, and complainant did not say whether he would do it or not. Admits that he afterwards refused to execute titles to him, &c.

Upon the trial, *Paschal Brisentine* testified: That he was the brother in-law of complainant, and son-in-law of defendant. He had made a verbal contract with complainant to sell him the lot of land in controversy, for \$200 dollars, to be paid in three equal annual installments, and the papers were to be drawn up and signed afterwards. Witness prepared the notes and other papers, but before they were signed, the defendant proposed to make an arrangement that he thought would be beneficial to both parties. It was, that he, defendant, would pay witness \$200 by the 25th December, and give Lumpkin four years to pay for the land. Lumpkin was to clear thirty acres of land and make other improvements. Witness drew up the contract in accordance with the agreement; Lumpkin refused to sign it, and there was a good deal of grumbling between the parties. Johnson then said he was tired of the fuss, and if he had his money back he would be out of it. Complainant then asked Johnson how long he would give him to pay him back; would he give him two weeks? Defendant replied, "Yes, I will give you till Christmas, as I have no need of the money to pay Brisentine before that time." Complainant then said to witness, "take notice to that."

Larkin Barrett, proved, that he let Lumpkin have \$200, and a day or two before the time expired, he went with Lumpkin to defendant's; Lumpkin said to him, that he had come to pay him the money, and get a title to the land, and that he had the \$200 in hand. Defendant replied, "whose superscription is that;" "render unto Cæsar the things that

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are Caesar's," and refused to take the money, and said if the land was to go to a stranger, he must have \$400. Witness went along to write the deed.

The jury found for the defendant.

Whereupon, complainant's counsel moved for a new trial, on the ground, that the verdict was against law and equity, and the evidence; and further, because the Court charged the jury, among other things, that the statute of frauds applied to the agreement proved.

The Court refused the motion, and counsel for complainant excepted.

UNDERWOOD & SMITH, for plaintiff in error.

J. R. ALEXANDER, *contra*.

By the Court.—BENNING J. delivering the opinion.

Was the Court below right in holding, that the statute of frauds applied to the agreement which the bill sought the specific performance of.

That agreement was the agreement, if it could be called an agreement, by which, Johnson, the father-in-law of Lumpkin, promised Lumpkin, when he wanted "to get out of the fuss," that if Lumpkin would pay him, two hundred dollars, by the end of the year, he might have the land. Lumpkin, himself, never promised any thing on his part. But call this an agreement; then, was there any thing, to take it out of the statute of frauds? Nothing that we can see. There was not the thing of part performance. Lumpkin did nothing whatever, in performance of the agreement. He *offered* to pay the money, at the proper time, but that was not paying it. He was in possession of the land, it is true, but his being so, was under the previous contract, or indeed contracts—not under this contract. It does not ap-

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pear, that he laid out any labor or money on the land, *after* the making of this, the last contract.

For aught that we can see, then, the Court below was right, in holding, that the statute of frauds applied to the agreement.

And if the Court was right in holding that, then it could not be true, that the verdict was contrary to law and equity, or, contrary to evidence.

So we conclude, that none of the grounds of the motion for a new trial, were sufficient.

Judgment affirmed.

Judge LUMPKIN being related to one of the parties, did not preside.

**LAMBETH HOPKINS, plaintiff in error, vs. SEABORN B. WATTS,
et al., defendants in error.**

The plaintiff sues the defendant upon three promissory notes. The defence set up is, that they were discharged by a deed from the defendant to the plaintiff, to certain lots of land. The consideration expressed upon the face of the deed is \$2,700. The defendant writes a letter to the plaintiff, proposing to make him an absolute deed, and trusting him to do what is right between them.

Held, That parol proof is admissible, to show the true character of this transaction—the same not being inconsistent with the construction, which the law puts upon it.

Assumpsit, from Campbell county. Tried before Judge HAMMOND, at September Term, 1858.

This was an action by Lambeth Hopkins, of the city of Augusta, Georgia, against Seaborn B. Watts and James Beall,

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of the county of Campbell, on three promissory notes, amounting in the aggregate to about twenty-four hundred dollars; all the notes dated 5th May, 1854: One for \$814 15, payable ninety days after date; one for \$802 22, payable sixty days after date; one for \$790 29, payable thirty days after date.

The defendants pleaded payment: In this, that defendant, Watts, on the 17th February, 1855, conveyed to plaintiff certain lands and lots in the town of Palmetto, Campbell county, Georgia, including the residence of defendant, in payment of said notes, and the deed of conveyance then executed, was received and accepted by plaintiff in full satisfaction and discharge of said indebtedness.

Upon the trial, plaintiff proposed to read the following answer of John C. Haralson, a witness examined on the part of plaintiff by commission, viz: "I went to Palmetto as Mr. Hopkins's agent, about the time mentioned, (February, 1855,) to make a settlement with the defendant, Watts. There was no conveyance made at the time of any property, but there was an agreement, that he should make a deed to certain lots in the town of Palmetto, Georgia, and send it down by mail, which the defendant, Watts, afterwards sent forward to plaintiff. At the time mentioned, the defendants were indebted to the plaintiff on three notes, and defendant, Watts, was indebted to the plaintiff on an open account, besides these three notes. The notes amounted to twenty-four hundred and six dollars and sixty-six cents. Watts and Beall were the makers. The deed was executed and sent as above stated, to secure the amount of indebtedness to the extent of the actual value of the property when sold. It was not agreed that the notes should be returned to the defendants. I think they were in my possession at that time, and my recollection is that it was understood and agreed that plaintiff was to sell the lots whenever they could be disposed of without a sacrifice, and the proceeds applied in payment as far as they might extend. I also promised on behalf of Mr.

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Hopkins, that he would not sell the property hastily. This agreement was made at Palmetto, Georgia."

Defendant objected to the reading of this answer. The Court ruled out all the latter part, from and after the word "stated," and plaintiff excepted.

In the argument to the jury, counsel for the defendants took the ground, that if they, the jury, should find for the plaintiff the amount of the notes in suit, plaintiff could collect his judgment and still hold the property conveyed in the deed, or sell it, and turn defendant out.

In reply to this position, plaintiff's counsel requested the Court to charge the jury that if they believed the notes were the consideration for the deed, and defendant should pay them off, then the deeds would be *functus officio*, and a Court of Equity would decree it to be cancelled. The Court failed to give this charge, and plaintiff excepted.

The jury found for the defendants, and plaintiff moved for a new trial on the ground of the rulings, and refusal to charge as above excepted to, and on the further and additional grounds, that the verdict was without evidence, contrary to evidence and law, and contrary to the charge of the Court.

The Court refused the motion for a new trial and plaintiff excepted.

OVERBY & BLECKLEY, for plaintiff in error.

EZZARD & COLLIER, *contra*.

By the Court.—LUMPKIN, J. delivering the opinion.

We think the whole of the answer of John C. Haralson, to the second interrogatory propounded to him should have been read to the jury.

The defendant, Watts, pleads payment to the notes sued on. And to support this defence, he undertakes to show,

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that the consideration of the deed which he gave to Hopkins, was these notes, instead of \$2,700, the consideration stated upon the face of the deed. This then, makes it necessary to enquire for what purpose the deed was given? And the testimony of Haralson, was offered for that purpose. It does not contradict or vary the deed. It is consistent with it.

Mr. Watts, in writing to Hopkins, after considering the several plans which had occurred to him for arranging the debt which he owed to Hopkins, and repudiating distinctly, as he does, the giving of a mortgage, comes to the conclusion, "to make a *bona fide* deed to the property, and leave you," (Hopkins) "to do as you please with the matter, having the utmost confidence in your honesty and friendship for me and my family."

An absolute deed was made in conformity with this suggestion. What was the effect of it? To constitute Hopkins the trustee of his debtor, with a discretionary power to dispose of this property as he pleases, either to himself or to any body else. Of course, in doing so, due regard must be had to the interest of Watts. And the testimony of Haralson, which was rejected, is in perfect consistency with the construction which the law puts upon this transaction.

If Hopkins took the property in payment of his debt only, why was Watts permitted to remain in possession of it, even down to the present time? And why were the notes not given up, as it was agreed should be done, if Hopkins determined to take the property as payment? On the contrary, he held them from February, 1855, when the deed was made, up to August, 1857, when the suit was brought. And it is then, for the first time, that we hear of the defence, that the discharge of the notes, was the consideration for the deed. It may be so. And if, after hearing all the proof, the jury should so find, it is their privilege to do so. Still, the whole of the testimony, we think, should be let in.

Judgment reversed.

Fleming vs. Collins.

PORTER FLEMING, administrator, plaintiff in error, vs. WILLIAM H. COLLINS, defendant in error.

A Court of Equity will not enjoin an administrator from suing to recover a tract of land, for the benefit of the heirs, notwithstanding the seven years bar has attached, when one of the only two heirs, was before and at the time of the intestate's death, and has been ever since, *non compos mentis*; and the other a *feme covert*, abandoned by her husband, who would not sue, and the wife, by reason of her *coverture*, could not.

In Equity, from Gilmer county. Decision by Judge RICE, October Term, 1858.

This was a bill filed by William H. Collins, against Porter Fleming, administrator of John A. Meigs, deceased, to enjoin Fleming from prosecuting an action of ejectment against complainant, for lot of land No. 175, in the seventh district, and second section of Gilmer county.

The bill alleges, that complainant purchased said land on the 25th August, 1847, from one James S. Hood, who conveyed the same by deed to complainant, who entered upon it, and has held possession ever since; erected improvements, planted orchards, cleared land, and has had full, notorious and uninterrupted possession of the premises from the time of said purchase, up to the period of filing his bill.

The bill further states, that said Fleming has brought suit against complainant for said land; that said suit is by Fleming as the administrator of one John A. Meigs, deceased, and that he relies upon a grant from the State to his intestate, who died more than ten years before the commencement of the action; that there are no debts against said deceased, and the heirs and distributees labored under no disability, and that complainant is entitled to the equitable bar of the statute of limitations to protect him against the action at law. The injunction was granted.

Defendant, Fleming, answered that he had been appoint-

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ed administrator of John A. Meigs, deceased, who died in November, 1845; that he was appointed administrator, September, 1855; that he relied upon a grant from the State, to his intestate, John A. Meigs; that he did labor under a disability which prevented him from asserting his title to said land; that he was *non compos*, more helpless than an idiot, deaf and blind from his birth; that defendant was appointed administrator within less than seven years prior to the commencement of the action of ejectment, and he submits that the statute of limitations cannot avail the defendant at law, neither is he entitled to its equitable bar in equity; that complainant bought said land from Hood, and relied solely upon Hood's title; that he paid only thirty dollars for the lot, worth several hundred. That the heirs of defendant's intestate, are his two sisters, one of whom, Eliza Meigs, is, and long anterior to death of intestate, was, an idiot or lunatic, and an inmate of an Asylum, and dependent upon charity for a support; that the other sister is a *feme covert*, having a husband living, though she is separated from him. Admits that there are no debts against deceased.

Upon the coming in of the answer, defendant moved to dissolve the injunction, upon the ground that the equity of the bill had been fully sworn off.

The Court refused the motion to dissolve, and defendant excepted.

DAWSON A. WALKER, for plaintiff in error.

Wm. M. MARTIN, represented by COLLIER, *contra*.

By the Court.—LUMPKIN J. delivering the opinion.

Ought the injunction in this case to have been retained? Clearly not, as to the right of the plaintiff to recover one-half of the land sued for.

Lyon, Sheriff, vs. Wilcher.

John A. Meigs, the intestate of Porter Fleming, had but two heirs; one an idiot sister, who, before and at the time of his death, and ever since, has been *non compos mentis*, and the inmate of an Asylum. How is it as to the other half? The only other heir was a *feme covert*, who as the answer alleges, was abandoned by her husband, when the right to this property accrued, and has been ever since. Should a Court of Equity restrain the administrator from recovering her share of this land, when she could not sue for it herself, and her husband would not? Is not her equity as good, if not better than the defendant's, who comes into a Court of Equity and asks its aid to protect his statutory title, purchasing as he did, from one, who had no title to the land, and made no pretence even, that he was the true owner?

Should this moiety of land be recovered by the administrator, it will not be for the benefit of the husband, who had a right to sue, but it will be settled upon the deserted wife, who, being under coverture, could not move in the matter.

Situated as this woman is, it seems to us, that her's is the better equity of the two; and we so decide.

Judgment reversed.

EMANUEL LION, Sheriff, plaintiff in error vs. WILLIAM T WILCHER, defendant in error.

Money in the hands of the Sheriff, belonging to one mercantile firm cannot be appropriated to the payment of cost executions against another firm.

Rule against Sheriff, in Polk Superior Court. Decision by Judge HAMMOND, at April adjourned Term, 1858.

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Verderey & Burton held a mortgage against Augustus N. Verderey, to secure a debt of about seventeen hundred dollars. This mortgage was assigned and transferred by the mortgagees to Wiley, Banks & Co., and Lane, Banks & Co., as collateral security for debts, due by the assignors to them, under an agreement or understanding, that the debt due to Wiley, Banks & Co., was to be first paid, and then that due to Lane, Banks & Co. About eleven hundred and fifty dollars of the mortgage was paid by the mortgagor before foreclosure, and which was paid over in satisfaction of the claim of Wiley, Banks & Co. The mortgage was then foreclosed, for the balance due, and upon the *f. fa.* issued upon judgment of foreclosure, the Sheriff raised about eight hundred and fifteen dollars, of which sum, five hundred and fifty dollars was paid by the Sheriff to plaintiff's attorneys, in part payment and satisfaction of the claim of Lane, Banks & Co. The balance, about two hundred and sixty-five dollars, was in the hands of the Sheriff.

Upon the motion of Wilcher, the Clerk of the Court, in behalf of himself and other officers, a rule issued against the Sheriff, to show cause why he should not pay over to said officers, out of the proceeds in his hands, the amounts due to them, on certain *f. fa's.* issued for cost, against said plaintiffs in the mortgage *f. fa.*, and which had been returned *nulla bona*.

The Sheriff answered, setting out the above facts, and further, that the balance of the funds in hand, belonged exclusively to Lane, Banks & Co., and no part thereof belonged to Wiley, Banks & Co., and that these two firms are composed of different persons. That he was ready and willing to pay the executions against Lane, Banks & Co., issued as aforesaid for cost, but submits whether he shall pay the executions against Wiley, Banks & Co.

It appeared that there were twenty-one cost *f. fas.* at the suit of the officers of Court against Wiley, Banks Co., amounting in the aggregate to about two hundred and fifty dollars;

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and three *f. f. s.* against Lane, Banks & Co., amounting to about thirty-five dollars.

Upon this answer the Court made the rule absolute, and ordered the Sheriff to pay off all the cost *f. f. s.*, as well those against Lane Banks & Co., as those against Wiley, Banks & Co. To which decision counsel for Lane, Banks & Co., through Emanuel Lyon, Sheriff, excepted.

CHISOLM & WADDELL, for plaintiff in error.

UNDERWOOD & SMITH, *contra*.

By the Court.—McDONALD J. delivering the opinion.

This cause must be determined by the return of the Sheriff, which was not controverted. According to that return, the money in his hands, belonged exclusively to Lane, Banks & Co., and no part belonged to Wiley, Banks & Co. The mortgage was assigned to Wiley, Banks & Co., and to Lane, Banks & Co., under an agreement that Wiley, Banks & Co., were to be first paid. They had been paid in full, and of course, had no further claim upon the fund. The Court below directed the money of Lane, Banks & Co., or a part of it, to be applied to cost executions against Wiley, Banks & Co. Executions or judgments against Wiley, Banks & Co., could have no lien on the property or money of Lane, Banks & Co., and could not be levied on it, in the hands of the officer or elsewhere, and to order money of Lane, Banks & Co., to be applied to the payments of judgments of Wiley, Banks & Co., is erroneous, and the judgment to the Court below to that effect must be reversed.

Judgment reversed.

ATLANTA, MARCH TERM, 1859

Cunningham vs. Rome R. R. Co.



CORNELIUS T. CUNNINGHAM, plaintiff in error, vs. THE ROME
RAILROAD COMPANY, defendant in error.

A railroad company filed their bill in which, they stated, that they had the right of way, over a certain piece of land; and, that a certain person was about to erect a flouring mill within seven or eight feet of their track; and, that the mill, if so erected, would leave no sufficient room, for the repair and construction of the track. They prayed for an injunction to prevent the erection of the mill.

Held, That they were entitled to the injunction.

In Equity, in Floyd Superior Court. Decision on demurrer, by Judge HAMMOND, February Term, 1859.

This was a bill in equity, by the Rome Railroad Company against Cornelius T. Cunningham to enjoin and restrain defendant from trespassing on lands of complainant, adjoining its railroad, and from locating and erecting certain steam-flouring mills thereon.

The bill alleges, that on the 2d April, 1849, complainant purchased from Alfred Shorter, amongst other property, the land in question; that the deed from Shorter described the land as "*extending twenty-five feet on each side of the railroad track, as now laid out, commencing at the Southern line of Broad street, and back on each side of the railroad track, the distance of one thousand feet, as represented on the plat hereto annexed, also the right of way to build, own, and keep up, and use the said railroad as now constructed, through lot of land, number 277, in the twenty-third district, of the third section, in said county of Floyd, also through that portion of land, No. 276, in the district, and section aforesaid, lying west of Oostanaula street, excepting such portion or interest in 277, twenty-third district and third section, as may be adjudged to belong to J. W. M. Berrien or George Tuggle or George W. Tuggle, or their creditors,*" &c.

The bill further states that subsequent to the aforesaid purchase by complainant from Shorter, defendant purchased

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from him certain lots, immediately adjoining the line of railroad, and which are adjoining the lands purchased as aforesaid, by complainant from Shorter. That Cunningham has commenced digging and excavating the earth, for the foundation of a steam flouring mill, within seven or eight feet of the railroad track, and upon the ground and strip of land purchased as aforesaid, from Shorter by complainant, not leaving sufficient room or space for repairing and constructing the road, as was contemplated in and by the conveyance from Shorter. That complainant, although entitled to twenty-five feet of ground on each side of said road, under Shorter's deed, has proposed to defendant to allow him to place his mill at the distance of eighteen feet from the center of said railroad track, and to allow him a *turn-out*, upon said eighteen feet strip between said mill and road.

Prayer, that the defendant be enjoined from locating and erecting said mill, &c.

To this bill defendant demurred. The Court overruled the demurrer, and defendant excepted.

UNDERWOOD & SMITH, for plaintiff in error.

DANIEL S. PRINTUP, *contra*.

By the Court.—BENNING J. delivering the opinion.

Was the Court right, in overruling the demurrer to the bill? We think so.

The site of the contemplated mill, was, not on any part of the thousand yards strip, but, further down, somewhere on lot 276, or lot 277. According to the deed, the company had nothing in either of these two lots, but a right, of way. The grant in the deed, is expressed in these words; "Also the right of way, to build, own, and keep up, and use, the said railroad, as now constructed."

The bill then says, that the way, the right to which was thus

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granted, was to be of a width sufficient, for all the necessary purposes of the company, and, that the "understanding" was, that the width was to be, from thirty-six to fifty, feet.

The bill then says, that the mill was to be erected within seven or eight feet of the track of the road; and, that, if thus erected, there would be "no sufficient room for the purposes and necessities of" the company, "in the repairing and construction of said Railroad."

All these things the demurrer admits to be true.

If the "understanding" between the parties to the deed, be taken as the test, the mill would be clearly an obstruction, standing in the way granted, for, by that understanding, the way granted was to be at least thirty-six feet wide, eighteen feet on each side of the track, and every obstruction to a way is a nuisance—and, such a nuisance, that, in general, we may say of it, that the damages it occasions, are not adequately measurable by money. Hence, in almost every case of such a contemplated obstruction, there is jurisdiction to equity, to interpose by injunction, and prevent the doing of that which, if done, would make the obstruction. And we see nothing in the present case to exclude it from the general rule.

And even, if we lay the understanding of the parties out of the question, and go by the letter of the deed, the case does not seem to be, materially, altered—the allegation in the bill considered. That allegation is, that the erection of the mill, would not leave sufficient room, for the repairs and construction of the track. The letter of the deed gives sufficient room for such repairs and construction. Therefore, the erection of the mill, would violate the letter of the deed—taking as we must, the allegation of the bill, to be true. And the injury or damage occasioned by such a violation, would be equally as difficult, of measurement in money, as the injury or damage, in the case first considered.

Even, then, if the case be confined to the letter of the

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deed, there was jurisdiction to equity, to interpose by injunction.

Injunction in cases of this kind, is on many obvious accounts, a preferable remedy to a suit for damages. And the only question in them, is, one as to the remedy. The party sued comes into equity and demurs; thus he admits himself, a wrong doer in purpose, and yet he says—do not interfere with me, let me carry out my purpose. The law will give the party I injure, redress. There, surely can be little in such a plea as this, to commend it to favor. It ought to be disregarded if possible.

Judgment affirmed.

CHARLES W. STILL, exo'r, plaintiff in error, vs. THE MAYOR AND COUNCIL OF THE CITY OF GRIFFIN, defendant in error.

When, in founding a city, certain lots are reserved, and dedicated by the founder to particular public purposes, and the donees fail or refuse to accept the same, these lots revert to the grantor; and the vendor's lien for the unpaid purchase money attaches upon said lots, or rather, has never been detached, inasmuch as the title to the same has never passed out of the donor.

In Equity, from Spalding county. Tried before Judge CABANISS, at November Term, 1858.

This was a bill filed by plaintiff in error, in Spalding Superior Court, to enforce his vendor's lien for the unpaid purchase money on certain parcels of land in the city of Griffin, sold to the Monroes Railroad and Banking Company, by complainant's testator, Bartholomew Still, deceased, and set apart and dedicated by said company to certain religious denominations, as places for the erection of houses of worship, when

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the town of Griffin was laid out, but which never had been accepted or used by said denominations.

The cause proceeded to trial on the bill, answer and replication. The conveyance of the lands by Bartholomew Still, to the Monroe Railroad and Banking Company, was admitted in the answer of the defendant; and that the Monroe Railroad had been sold out, and was insolvent; and that all its assets and franchises had gone into the hands of the Macon and Western Railroad Company, as the legal successor of the Monroe Railroad and Banking Company. Letters testamentary were introduced by complainant.

Lewis L. Griffin testified: That he was President of the Monroe Railroad and Banking Company from its organization to January, 1842, and that while he was such President, he bought of B. Still said lands, in his *individual capacity*, and afterwards, and by and with the consent of the said Still, the said company took up his notes, and gave theirs in the place; that he signed the notes as President, by the order of the board of said company, and that it was for the lands on which the city of Griffin was laid out in 1842; that he thought he paid, in his individual capacity, part of the purchase money for the land, and afterwards, when the railroad company took up his notes, they paid him what money he had paid out; that there was no security given; that the notes mentioned in the bill are the same notes; he was President when the notes were signed, and signed them by express order of the board of said company. That he bought these lands in his individual capacity, for the purpose of sounding a city, and the company promised to carry the plan out.

The notes having been lost, *Amos W. Hammond* testified: That he had the original notes; that no other person has had them; that he made the copies attached to the interrogatories of Griffin from them, and that they were lost, and that he knew they were made by L. L. Griffin, President of the

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Monroe Railroad and Banking Company; that he knew his hand writing.

The map by which the city was laid out was exhibited.

Alexander Belamy testified: He knew the lots which were reserved at the sale, by the map just produced; the Episcopal and Protestant Church lots are now vacant; the Presbyterian Church lot and Female Academy lots are both occupied; there is a lot which was reserved for ornamental purposes now enclosed, but not occupied; the Cumberland Presbyterian Church lot is not occupied by them; the Baptist and Methodist Church lots, and Male Academy lots, are occupied; the public square is not enclosed; the public parade ground is not occupied; the court house lot, containing four acres, not occupied; all these lots are on 145, 2d dist. originally Monroe county, now Spalding; all these were reserved for public purposes, and lots were sold according to the map by which the city was laid out.

William Leak testified: That he was present when the lots were sold, and B. Still was present when the first lot was sold, and gave no notice of his vendor's lien; don't know that he was present when all the lots were sold; the plaintiff's testator, B. Still, acted as agent of the railroad company in selling lots, and had a plan of the town, and sold according to that plan; that plan was like that introduced in this case; he gave no notice of his vendor's lien; he showed lots to those who wanted to purchase.

J. B. Phillips testified: That he was present at the sale of these lots by this map, and Still gave no notice of his lien at the time of the sale.

The Court charged the jury: "That if B. Still was present at the sale of the lots in Griffin, and stood by and permitted persons to bid off lots, without asserting his lien, he is estopped from afterwards setting it up. The vendor's lien is a secret lien, and not favored by the law—a purchaser for a valuable consideration, and without notice of the lien, holds the land purchased discharged from the vendor's lien."

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Counsel for the complainant requested the Court to charge the jury, that if the Mayor and Council of the city of Griffin held the lots reserved for public uses, without having paid value therefor, they are volunteers, and not entitled to notice of the lien, and so far as they are concerned, notice need not have been given. The Court refused to give this request in charge, but charged, "that if the plaintiff's testator, B. Still, stood by at the sale, when lots were reserved for public use, and permitted bidders to buy lots, with reference to such reservations, and pay a valuable consideration for them, without asserting or making known his vendor's lien, he cannot now set up his lien upon lots so reserved; to which charge and refusal to charge, as requested, complainant excepted.

The jury, under the testimony and charge of the Court, found a verdict against the complainant for the cost.

Whereupon, counsel for complainant tendered their bill of exceptions, assigning as error the aforesaid charge and refusal to charge.

HAMMOND & Son, for plaintiff in error.

ALFORD, *contra*.

By the Court.—LUMPKIN J. delivering the opinion.

Conceding that the conduct of Still, at the public and private sales of lots in Griffin, amounted to a waiver of his lien as vendor, upon all of the lots which were bought by individuals, and those lots, and squares and streets that have been appropriated to the public purposes for which they were reserved, is he *estopped* from enforcing it against those which never have been so used? We think not; and the Court erred in not so discriminating in its charge to the jury.

The Monroe Railroad and Banking Company never made a conveyance, as to these public lots; and the title to them could only have been divested by the acceptance of the respective beneficiaries, to be signified by their user. User

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amounts to an acceptance. Some fifteen or twenty years have elapsed since the dedication was made, and the bill alleges, and the proof shows, that no steps have been taken to appropriate a portion of these public lots. The presumption of law is, that the donations have been declined. These lots have reverted to the grantor, and not to the city of Griffin; or to be more accurate, the title to these lots has never passed out of the grantor. And while it is true, that the lien of Still is detached as to the other lots, it attaches upon these.

It is said that the proprietors of real estate in Griffin, purchased at enhanced prices, on account of the dedication of these lots. It may or may not be so. There is no evidence that it is so. No complaint is made by them. It may be that contiguous proprietors to church lots, at least, would prefer not to have churches near them. This is true in most towns. It is a serious objection with many.

But suppose it were otherwise, and that they were before us urging this argument. It might be truthfully replied, that you bought, knowing that these lots might not be accepted for the purposes for which they were dedicated. And you knew, or ought to have known, that you could not compel them to do so.

As to the court-house lots, military parade ground and ornamental squares, or any other lots which were set apart for public uses, it is not necessary that they should be enclosed or improved in any particular way. It is sufficient if they have been used for the purposes for which they were set apart. And this will be the issue for the jury to try in each particular case. It is better, we doubt not, both for the city and adjoining lot holders, that these vacant lots should be sold, and improved by somebody. Were the religious denominations that have failed to act, strong enough to organize congregations and build churches in Griffin, it is very questionable whether they would be willing to accept the particular locations designed for them.

Judgment reversed.

Williams vs. Cash.

**BENJAMIN F. WILLIAMS, plaintiff in error, vs. JESSE CASH,
defendant in error.**

- [1.] If a defendant in ejectment enter on land sued for, under the lessor of the plaintiff, whether by purchase, gift or lease, he cannot dispute the title under which he entered.
- [2.] If defendant, after entering under the lessor of the pl. intiff. sets up a defense against him to a suit for the recovery of the land, hostile to the title under which he entered, he cannot claim to be a tenant at will, and entitled to notice to quit, before suit can be brought.
- [3.] If a defendant in ejectment entered into the possession of the premises sued for, under a contract of any sort for a title, the statute of limitations could not begin to run in his favor, until he repudiated the contract, and claimed to hold in defiance of plaintiff's title, and the plaintiff had knowledge of such adverse holding.

Ejectment, in Cass Superior Court. Tried before Judge TRIPPE, at September Term, 1858.

This was an action of ejectment by Doe, *ex dem.*, Jesse Cash, against Roe, casual ejector, and Benjamin F. Williams, tenant in possession, for the recovery of lots of land Nos. 1141, 1163 and 1164, in the seventeenth district, third section, of originally Cherokee, now Cass county, each containing forty acres.

Brief of Evidence.

Plaintiff offered and read, in evidence, a grant from the State to Cash, the lessor, for the lots in controversy. A deed from Cash to James Dickerson for same lots, and a re-conveyance, by deed, from Dickerson to Cash, and closed.

Defendant read the depositions of the following witnesses, taken by commission:

James Tallent. Int. 1st. He knew the parties.

2d. He answers he is acquainted with the land, that the defendant, Williams lives on, and which is sued for in this action; was at his house in February, in the year 1844, and Williams was living on the land then; has been personally acquainted with him ever since, and he has been

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in possession of the land ever since, and has cleared about sixty or seventy acres upon the land.

3d. He answers that the defendant, Williams, has claimed the land in dispute, as his own property, as a gift by Jesse Cash to his daughter, who is the wife of the defendant.

4th and 5th. He answers he knows nothing.

6th. He answers, he has stated all he knows that will benefit the defendant.

Evidence of *James M. Ware*.—I heard the old man Cash, the plaintiff in this action, say to James Dickerson, that he would take back the land he sold to him, provided B. F. Williams, the defendant, would take it, and said he would make B. F. Williams's wife and children, a title when certain impediments were removed. The conversation took place in the year 1844, at James Dickerson's house, in Cass county, and that B. F. Williams moved to the place in the winter thereafter; and the numbers of said lots of land, as well as remembered, are Nos. 1141, 1163 and 1164, in the 17th district, and 3d section of Cass county. Williams has claimed the land, as his own, ever since he moved to it, and exercised ownership over it all the time.

Cross examined.—I never heard the plaintiff say anything about possession at no time or place.

I never heard the defendant say any thing about dividing the land between the defendant and plaintiff's son, and I never heard the plaintiff say that the defendant was to have any portion of the land as his portion of the estate of the plaintiff; has heard defendant claim said land in three years, and where he was, and what he was doing, I cannot tell. He answers, I never heard defendant say he was holding the land as tenant under the plaintiff.

Samuel Higginbottom. Int. 1st. He answers he knows the parties.

2d. He answers that he knows nothing of his own knowledge, but some time in August, 1844, Jesse Cash sent

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for me to come to said Williams's, and then and there said to me that he had given to his daughter (Mrs. Williams) the wife of said Williams, the defendant, in the case, the three lots of land, that they are now a lawing about, and said land was to come out of her part of his estate, and said Jesse Cash was to make her titles to said land whenever they could get the old mill-dam down; and this conversation took place some time in August, 1844, at the house of the defendant Williams; and Newton Ashly and William Ashly and Mrs. Williams were present at the time this conversation took place between me and Jesse Cash.

3d. He answers, that Williams, the defendant, went into possession of said lots of land in January, 1845.

4th. He answers, that he heard Jesse Cash say that he had sold said lots of land to James Dickerson, and had taken them back to let his daughter have them.

Cross-examined.—*Int.* 1st. He answers, that all that the plaintiff said was, that the lots of land were to come out of her part of his estate.

2d. He answers, that the agreement between plaintiff and defendant was, that whenever they could get the mill-dam down, he was to make her titles to the land.

3d. He answers, I have seen Jesse Cash three times in all.

Newton and William Ashley's evidence.—*Int.* 1st. Both answer they know the parties.

2d. Both answer, they know the land in dispute, and they heard the plaintiff, Jesse Cash, say to defendant, Williams's wife, that if her husband, Williams, who is the defendant in this case, would go on said land, that he would make her a title to it the first time he came out to see them, and the said Williams went into possession some time in January, 1845, and Williams has been in possession ever since, and that he always claimed said land as a gift to his wife, and said land was to go in part of her estate at his death.

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3d. Both answer, they have answered all they know that will benefit the defendant, as though they had been interrogated thereunto.

Cross int. They both answered, that they have heard Jesse Cash say the land in dispute *was* his, but if defendant, Williams, would go on said land, he would give it to his wife; and both say they never heard Cash say that Williams ever was to leave said land, and have related all they know that will benefit the plaintiff.

Benjamin F. Smith. Int. 1st. He answers, he knows the parties.

2d. He answers, he knows the numbers of land stated in the question, and states that he has known the land about fourteen years; first in the possession of James Dickerson, and claimed by the said B. F. Williams, the defendant in the above case, who went in possession some time in January, 1845, and has been claiming and exercising ownership over said land ever since.

3d. He answers, that he has answered this interrogatory in the second.

4th. He has answered all that will benefit the defendant.

William H. Cash, for plaintiff, in reply. He answers, that he was not acquainted with the premises, only by reputation. The terms under which the defendant went into possession of the premises, as he understood them from Jesse Cash and defendant, were, that Jesse Cash told defendant and myself, that we might go on the premises, and work there until he, Jesse Cash, called for possession, and the defendant went into possession under that agreement; this is all the agreement about the premises that I ever heard, or knew of being made, between the said Jesse Cash and the defendant.

5d. He answers, that he has no interest in the matter; was to go on the place which Jesse Cash gave defendant, and had leave to go there, but made other arrangements, and declined going on the place, but was not to be a partner

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of defendant, if he had gone on the place. We both had leave at the same time from Jesse Cash, to work on equal portions of the land, each one to himself.

4th. He answers, he cannot recollect exactly when this agreement was, thinks some seven or eight years ago last August. The agreement was made at defendant's house, in Cass county, in said State; the agreement was, that if Jesse Cash charged rent, we (myself and defendant) were to pay it in cotton or flour.

The jury, under the charge of the Court, found for the plaintiff, and defendant moved for a new trial, on the following ground:

1st. Because the verdict was contrary to evidence.

2d. Because the verdict was contrary to the weight of evidence.

3d. Because the verdict was contrary to the charge of the Court.

4th. Because the Court erred in not charging the jury as requested by defendant's counsel, that if defendant went into possession of the premises, as his own, with the understanding that Cash was afterwards to execute a deed of conveyance to Mrs. Williams, defendant's wife; that fact does not constitute him a tenant at will, of Cash; nor does it prevent the statute of limitations from running in his favor. But, on the contrary, the Court charged the jury, that if defendant took possession, claiming the land as his own, and retained that possession, and continued that claim for seven years prior to the passage of the Act of January, 1852, then he had acquired a good statutory title, and the jury ought to find for him; but if defendant took possession of the premises under a promise by plaintiff, that he would, at some future time, convey the same to defendant's wife and children, for their sole and separate use, and which he had never done, then the statute would not run against the plaintiff, until defendant claimed the land as his own, and plaintiff had knowledge of said claim.

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The Court overruled the motion for a new trial, and defendant excepted.

MILNER & PARROTT, for plaintiff in error.

WOFFORD & CRAWFORD, *contra*.

By the Court.—McDONALD J. delivering the opinion.

This was an action of ejectment, in the Superior Court of Cass county. The jury rendered a verdict for the plaintiff, and the defendant moved for a new trial on the several grounds set forth in the foregoing statement, by the Reporter. The presiding Judge refused to grant a new trial, and error is assigned on his judgment refusing it. According to the record before us, the defendant entered into possession of the premises sued for under the lessor of the plaintiff, Jesse Cash, either under a verbal donation or of a promise to give the land to the defendant, or to his wife, or to his wife and children, or under a lease, he to pay rent in corn or cotton. There is some evidence to each of these points, but the weight of the evidence is, that he entered into possession of the land under a verbal promise, that as soon as certain impediments were removed, he would execute a title to the defendant's wife and children. If the defendant entered under the lessor of the plaintiff, whether by purchase, gift, lease, or otherwise, he cannot dispute his title. *Leigh's Nisi Prius, and cases referred to in the note 925.* So far, then, as the plaintiff's right to recover the premises in dispute, depended on the evidence adduced by him, it was perfect as to the defendant.

[2.] The defence of adverse possession for a period that would bar the plaintiff's right of action, was set up. This defence was inconsistent with a tenancy at will, and it was not necessary for the plaintiff to prove notice before he brought the suit, that he had determined his will.

The case of the plaintiff in error, then, depends on the

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merits of his defence under the statute of limitations, and those merits may be fully examined on the errors assigned, upon the refusal of the Court below to charge the jury as requested by the counsel for the plaintiff in error, and upon the charge of the Court, as given to the jury.

[3.] The counsel for the plaintiff in error requested the Judge presiding at the trial, to charge the jury, that if the defendant (plaintiff in error) went into possession of the land as his own, with the understanding that the lessor of the plaintiff should execute to defendant's wife a conveyance, that does not constitute him tenant at will of the plaintiff, and does not prevent the statute of limitations from running.

It is by no means clear, that the evidence in the cause warrants the charge; but the request is inconsistent with itself, for the defendant could not enter into possession of the land as his own, while he acknowledged the title out of him by stipulating that a conveyance should be executed to his wife by the person claiming title. But the request is substantially wrong, and ought not to have been given in charge to the jury, for "a party who has been let into the possession of land under a contract of sale, or for a letting which has not been completed, is a tenant at will of the vendor." *Bull vs. Cullimore, Withers et al, 2 Mason, Cr. Ros. Excheq'r Rep.* 122. *Dunb. vs. Hunter 7 Com. L. Rep.* 115. The request implies, that the title to the land was in the lessor of the plaintiff, and that a conveyance was necessary to pass it out of him. If the defendant entered under a contract of any sort for a title, the statute of limitations could not begin to run in his favor until he repudiated the contract, and claimed to hold in defiance of plaintiff's title, and the plaintiff's knowledge of such adverse holding.

The Court charged the jury, that if the defendant, previous to the year 1852, took possession of the land, claiming it as his own, and kept that possession, and continued that claim for seven years, the defendant acquired a good statuto-

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ry title, and the jury ought to find for the defendant. This charge is certainly as favorable to the defendant below, under the evidence in the record, as he could have asked. But the Court proceeded to charge the jury further, that if the defendant took possession of the land under a promise from the plaintiff to execute a conveyance to the defendant's wife and children, the statute would not run until the plaintiff had notice that the defendant claimed the land in hostility to the plaintiff, and this charge is also assigned as error. We are in a Court of law, and the cause must be decided on legal principles. We express no opinion upon the right of the defendant below, and his wife, if he can establish satisfactorily, a contract of the sort alluded to in this charge, and that he entered, and made the improvements under that contract, which are testified to by some witnesses, as stated in the record, to have said contract executed. But the contract, as here stated, a promise to execute a conveyance to the defendant's wife and children, admits the legal title to the land to be in the lessor of the plaintiff, and if the defendant took possession of the land under such promise, he recognized the title under which he entered, and the statute cannot run in his favor until he gets clear of the force and effect of that recognition, by assuming an adversary position to it, with notice to the party under whom he entered. We think, therefore, that in no aspect in which we have been able to view this case, under the proofs before us, can the plaintiff maintain either a title or possession, under the statute of limitations.

Judgment affirmed.

Puryear vs. Nisbet.

SEYMOUR PURYEAR, claimant, plaintiff in error, vs. THOMAS C. NISBET, plaintiff in *factum*, defendant in error.

The lien of a machinist for machinery furnished for a mill, &c., must be enforced according to the provisions of the Act of 1834, as extended by the Act of 1854; and not those of 1841, as extended by the Act of 1852.

Machinist's Lien and Claim, from Henry county. Tried before Judge CABANISS, at October Term, 1858.

This case was heard upon the following agreed statement of facts:

Thomas C. Nisbet, the plaintiff in execution, is a machinist, and on the 25th April, 1855, he furnished to Austin C. Miller, the articles mentioned in his pleadings. Nisbet, on the 5th March, 1856, made affidavit before the honorable G. J. Green, the then Judge of the Superior Court of the Flint District, of the amount due to him from Miller, for said articles, as provided by statute in such cases made and provided: That on the said 5th March, 1856, said Judge granted an order, directing the Clerk of the Superior Court to enter up judgment in favor of Nisbet against Miller, and the articles of machinery specified in his affidavit, for the amount sworn to be due, and unpaid; that the Clerk entered judgment as directed on the 14th March, 1856, and issued execution thereon, 19th March, 1856, which was levied on the machinery therein mentioned, on the 3d April, 1856. That a personal demand for the amount due was made of defendant before the filing of plaintiff's affidavit and petition, and payment refused. That the claim of Nisbet was not recorded until his affidavit and petition were filed, as aforesaid, and a short time previous thereto, the claimant, Puryear, who is a brother-in-law of defendant, purchased the mill and premises on which it was situated, without notice of plaintiff's lien, and that he is still in possession of the same.

The Court below upon this state of facts, charged the jury,

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that if the plaintiff made a demand of defendant for the amount due for the machinery furnished to him, and put up in his mill, who refused payment, and plaintiff commenced his proceedings to recover the same, within twelve months after said demand became due, then the machinery was liable to the execution of plaintiff, notwithstanding claimant purchased without notice of his lien.

The jury found the property subject to the execution. Whereupon, claimant excepted and assigned as error the aforesaid charge of the Court.

L. T. DOYAL, for plaintiff in error.

ALFORD, *contra*.

By the Court.—LUMPKIN J. delivering the opinion.

This was a proceeding to enforce a machinist's lien for machinery furnished by him for a mill. And the question is, under what statute the case falls? The Act of 1841, (*Cobb*, 426,) as extended by the Act of 1852, (*Pamphlet*, 237;) or the Act of 1834, (*Cobb* 555,) as extended by the Act of 1854, (*Pamphlet*, 45.) Both sets of these Acts embrace the subject matter of the suit.

By the former two Acts, the machinist had to enforce his lien within twelve months; and a summary proceeding is given for that purpose. By the two latter Acts, the machinist must record his lien within three months, and enforce it within twelve months. In this case, the creditor adopted the former remedy. And not having recorded his lien, after the expiration of three months, the machinery which he supplied, was bought by a third person, having no knowledge of his lien. Did the creditor lose his lien by failing to record? We think the Act of 1834, as extended by the Act of 1854, must control the case. It is the last law upon the subject; and is inconsistent with the provisions of the previous Acts.

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It is more complete in itself, and more in accordance with the spirit of our mortgage Acts, and if the purchase in this case be *bona fide*, it must displace the plaintiff's lien.

Judgment reversed.

Eldridge G. Barlow, administrator, plaintiff in error, vs.
Edmund Stalworth, defendant in error.

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An action of assumpsit for money had and received, will not lie, unless the property of the plaintiff has been converted into money, or that which is its equivalent; and the consumption of the property by the defendant is not sufficient to authorize this remedy.

Assumpsit, from Henry county. Nonsuit by Judge CABBAGE, at October Term, 1858.

This was an action of assumpsit, brought by Eldridge G. Barlow, administrator of Thomas Stalworth, deceased, against Edmund Stalworth, for the recovery of three hundred and ninety-eight dollars and fifty cents, alleged to be due and owing by defendant to the plaintiff as administrator aforesaid.

The first count in the declaration alleged, that on the 18th Nov., 1855, the said Thomas Stalworth, the intestate, then in life, "delivered to the said Edmund Stalworth to be taken care of, and kept for the said Thomas during his sickness, and then to be delivered to him again, the following property, to-wit: fifty barrels of corn, then and there worth two hundred and fifty dollars; eighteen hundred pounds of good fodder, of the value of eighteen dollars; thirteen bushels of wheat, of the value of nineteen dollars and fifty cents; six hundred pounds of pork, of the value of forty-eight dol-

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lars; one wheat thrasher, of the value of twenty dollars. And further, that two negroes went into the possession of defendant at his special instance and request, and labored for him one month, each, and that the labor or hire of said negroes was worth fifteen dollars. And that in June, 1856, after the death of said Thomas, defendant cut and took into his possession twenty bushels of wheat, the property of intestate, and of the value of thirty dollars, all of which said several sums amount in the aggregate to the sum first aforesaid."

The declaration contained other counts, some special, and others, the common counts for money had and received, &c.

The proof on the part of the plaintiff was, that Thomas Stalworth, the deceased, was the son of Edmund Stalworth; that he sold out his land and removed with his wife, (he had no children,) to his father's; that he had consumption of which he died in three or four months after his removal to his father's. The articles described in the declaration, or some part thereof, were taken by deceased to his father's, for his own use and support; that after his death, the balance remaining of these articles, were demanded of defendant, by the wife of deceased, and he refused to deliver them up to her.

Administration was granted to plaintiff who instituted this action of assumpsit.

After plaintiff closed, defendant moved for a nonsuit. The Court sustained the motion and ordered a nonsuit, upon the grounds:

1st. That no promise, express or implied, had been proved by defendant, to pay for the articles mentioned in the declaration, and the same being carried to his house voluntarily by his son, did not raise an implied promise to pay for them.

2d. That an action of assumpsit could not be maintained, unless there was proof that defendant sold the property and

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converted it into money; that trover and not assumpsit was the proper remedy.

To which order and judgment counsel for plaintiff excepted.

L. T. Doyal, for plaintiff in error.

CLARK & LAMAR, *contra*.

By the Court.—LUMPKIN J. delivering the opinion.

Was the plaintiff entitled to maintain this action in its present form?

The authorities clearly establish, that unless the property of the plaintiff has been converted into money, or that which is equivalent to money, that assumpsit for money had and received, will not lie. And that even the consumption of the property by the defendant, does not authorize the action.

Under the Judiciary Act of 1799, it is questionable whether an action in the common Courts, could be sustained, because the case is not plainly, fully and distinctly stated. They are more general than Jones's Forms; for they require a copy of the instrument, which is the foundation of the suit, or of the account to be appended to the complaint.

We agree, consequently, with the Circuit Judge, that trover was the proper remedy in this case, if indeed any cause of action existed.

Judgment affirmed.

Culberson, adm'r, vs. Gray.

MARCUS L. CULBERSON, administrator, plaintiff in error, vs.
JAMES M. GRAY, defendant in error.

A *ca. sa.* having issued from a Justice Court, and the defendant arrested thereon, he gave a bond returnable to the next Term of the Inferior Court, to take the benefit of the insolvent debtors Act. At that Term, he was surrendered by his bail, who tendered a receipt for the original note upon which the judgment was rendered, and moved that the principal be discharged. The judgment had been sold as the property of the estate of the payee by his administrator, and bought by a third person.

Held, That the Inferior Court had no jurisdiction to try the title to the judgment.

Certiorari, from Carroll county. Decision by Judge HAMMOND, at October Term, 1858.

James M. Gray being arrested under a *ca. sa.* issuing from a Justice Court, in favor of Marcus L. Culberson, administrator of F. D. Palmer, deceased, gave bond, with James Backus as his security, conditioned, to appear at June Term, 1858, of the Inferior Court of Carroll county, to take the benefit of the Act for the relief of honest debtors. At the Term of the Court to which the *ca. sa.* was returnable, Gray was surrendered by Backus, and on motion, an *exoneretur* entered on the bond. Plaintiff's counsel then moved that Gray be taken into custody by the Sheriff, and committed to jail. To this motion, Backus objected, and offered in evidence a receipt corresponding in amount with the note upon which the judgment was obtained, upon which the *ca. sa.* issued. [The bill of exceptions and record are silent, as to whom this receipt was given, and by whom signed; but I suppose it was given by Palmer to Backus, and upon Palmer's death, his administrator brought suit upon the note as the property of his intestate. The execution obtained by the administrator on said note, was afterwards sold, Palmer's estate, being insolvent, and one Walker Green became the purchaser, without any notice of Backus's claim to the note on which it was founded.—*Rep.*]

Culberson, adm'r, vs. Gray.

Upon this evidence, counsel for *Buckus* moved that the case be dismissed. Plaintiff's counsel objected to this order; his objection was overruled, and the motion to dismiss granted by the Court, and plaintiff sued out a certiorari, to review and reverse said order.

The presiding Judge of the Superior Court upon the hearing, dismissed the certiorari, and affirmed the judgment of the Inferior Court, and plaintiff excepted.

W. B. CONYERS, for plaintiff in error.

FLETCHER & BURGER, *contra*.

By the Court.—LUMPKIN J. delivering the opinion.

If we understand this confused and imperfect record, and we are not sure that we do, the judgment below, we think, was erroneous.

It does not appear by whom the receipt was given, nor to whom it was given. It set forth the same note. We will assume that it was given for the note and that *Backus* became possessed of it; still, judgment having been obtained upon the note, and sold by the administrator of *Palmer*, *Palmer's* estate being insolvent, and bought by *Walker Green*, without notice of the claim of *Backus*; what right had the Inferior Court, to which the *ca. sa.* bond was returnable, to try the issue tendered by *Backus*? None.

Judgment reversed.

Block & Brothers vs. Hicks & Co.

BLOCK & BROTHERS, plaintiffs in error, vs. J. W. HICKS & CO., defendants in error.

- [1] A man's conduct may be such, as to authorize the presumption, that he admits to be well founded, a plea set up against his claim.
- [2.] The declaration of one party, uttered in the presence of the other, and not denied by that other, are admissible as evidence for the former.

Complaint, in Floyd Superior Court. Tried before Judge HAMMOND, at February Term, 1858.

This was an action in the form of complaint, by plaintiffs in error, against defendants in error, on a promissory note, for \$120, dated 28th May, 1856, and payable in six months after date. The consideration of the note, was gin and blackberry wine, sold to defendants by plaintiffs, and which they alleged were worthless, and refused to pay the note.

The jury found for the defendants, and plaintiffs moved for a new trial, on the following grounds :

1st. 2d. and 3d. Because the verdict was contrary to law, contrary to evidence, and strongly and decidedly against the evidence.

4th. Because the Court erred, in charging the jury, "that if they believed that the liquor sold by plaintiffs to defendants, was not such as was ordered, and which plaintiffs agreed to send them, they should find for the defendants;" there being no evidence to authorize such a charge.

5th. Because the Court erred in charging the jury, that the agreement on the part of one of the plaintiff's to give up the note, was such a fact as they might take into consideration, in ascertaining whether the liquor was such as was agreed to be sent.

6th. Because the Court erred, in refusing to rule out the testimony of Wade S. Cothran and James M. Elliott.

7th. Because the Court erred in refusing to rule out that part of Love's testimony, giving the declarations and sayings of one of the defendants.

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The Court overruled the motion for a new trial, and plaintiffs excepted.

PRINTUP; and SHROPSHIRE, for plaintiffs in error.

UNDERWOOD & SMITH, *contra*.

By the Court.—BENNING J. delivering the opinion.

Was the Court below right in overruling the motion for a new trial?

Passing the first, second, and third, grounds of the motion, we take up the fourth. Was there evidence to authorize the charge excepted to, in that ground? We think so.

The conduct of Julius Block, one of the firm of Block & Brothers, was sufficient of itself, to authorize the charge. Hicks told him, that the liquor was not such as was ordered, and wanted him, "to go to the depot, and examine it, and take it back, and give up the note." Block agreed to go, and examine it, and, if the liquor was not such as ordered, he would, and give up the note." After this, Block refused or failed to do as he had promised, and was about to leave town, when he was again accosted by Hicks, and told, "to go and examine" the liquor "and give up the note." Block told Hicks, that he did not have the note with him—that it was at Bayard's, and that he would be back in four or eight days, and would then arrange it." In fact, the note was not at Bayard's—Block then went off on the railroad, and when Hicks found out, that the note was not at Bayard's he pursued him, and, on overtaking him, he agreed to give up the note, and wrote an order on his attorney, directing him to give it up.

[1.] Now such conduct as this, in Block, was sufficient to justify the inference, that the liquor was not what it should

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have been, and that he knew it. Consequently the conduct, was sufficient to justify the charge of the Court.

The fifth ground is involved in the fourth. We do not see why, the whole of a man's conduct may not be taken into consideration, on a question arising out of a matter to which that conduct had reference.

As to the sixth ground—The objection to the testimony of Cothran and Elliott, was, that their testimony related to liquor contained in a barrel marked "J. W. H." not, "J. W. Hicks & Co." Now, if "J. W. H." was put for "J. W. Hicks & Co," the testimony was beyond question, admissible.

And Block's conduct aforesaid, authorizes us, *prima facie*, to say, that it was ; to say that the initials were put for the name.

Why did he not go with Hicks to the barrel at the depot, and avail himself of that objection, if there was anything in it? Certainly, the question, whether the identity of the barrel, was made out, was one for the jury.

[2.] As to the seventh ground—the sayings of one of the defendants which were testified to, by Love, were uttered in the presence of Block, and were not denied by him. His silence was, *prima facie*, an admission of their truth; consequently they were evidence for the defendants.

As to the grounds passed—the first, the second, and the third, we see nothing in them. The evidence was, as we think, quite sufficient to support the verdict.

Judgment affirmed.

Trammell, adm'r, vs. Hemphill and Montgomery.

JOHN TRAMMELL, administrator, plaintiff in error, vs. JAMES HEMPHILL and WILLIAM MONTGOMERY, defendants in error.

It is sufficient, to prove the *substance* of the testimony of a deceased witness.

Ejectment, from Floyd county. Tried before Judge HAMMOND, at August Term, 1858.

Jehial Jackson, of Habersham county, was the drawer of lot of land No. 411, of the third district and fourth section, originally Cherokee county, to whom a grant issued. He died in 1834, in Habersham county, without ever going in possession of said land. No administration on his estate was taken out, until recently, when letters were applied for and granted to John Trammell, who commenced an action of ejectment against James Hemphill, for the recovery of said land. Hemphill filed his bill to enjoin said action at law, and alleged that he purchased said land at Sheriff's sale, when the same was sold under an execution in favor of one Westmoreland, against Jackson, and which was issued in Jackson's lifetime, and that he has been in the peaceable possession of the same more than seven years, and has made valuable improvements, and that he has sold the same to William Montgomery, (who is also a complainant in this bill;) that Jackson at the time of his death was poor, and that there are no creditors of his estate, and if ever there were any, their claims have been long since barred by the statute of limitations; and charges that Trammell is prosecuting the action of ejectment, and is seeking to recover said land for his own benefit, and that of Westmoreland, and not for the heirs at law of Jackson.

Trammell answered, that Jackson was the drawer of said lot and did die in 1834, intestate; that he has no personal knowledge of the manner in which Hemphill became the purchaser of said land, but that he has been informed and

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believes that it was as follows: that Westmoreland, had an execution against one Enoch Slatton, principal, and the said Jehial Jackson as security, which execution was in Jackson's possession at the time of his death; after his death, his family removed to Westmoreland's, he being a relative, and took with them there, all his effects, including his papers, and Westmoreland thus (it is presumed) got possession of the *f. fa.*; that he afterwards visited the land in Floyd county, and returned home informing Jackson's family that he had not been able to make any arrangement about it.

Some time after this, the oldest son of Jackson, the family being in great need and destitution, went to Floyd county, to see if he could make some disposition of the land, when he found Hemphill in possession, and the lot a very valuable one in Vann's Valley; that defendant is informed and believes, that Westmoreland sold the land to Hemphill for a hundred and fifty dollars, and agreed to have the same sold at Sheriff sale under the old execution aforesaid, which was done, and at said sale it was publicly stated by Hemphill, that he had bought the land from the true owner, and was only having it sold to perfect titles, and he thereby kept others from bidding, and purchased the land at said sale at a mere nominal price; and defendant charges that thus by a fraudulent combination between Westmoreland and Hemphill, said land was sold, and that Hemphill knew at the time, that said execution had been paid off by Jackson, the security, and that Westmoreland had no right to the same, or to its control.

The case was submitted to the jury upon the pleadings, proofs, and charge of the Court, who found for the defendant in ejectment.

Whereupon, counsel for plaintiff moved for a new trial, on the following grounds:

- 1st. Because the verdict is against law and evidence.
- 2d. Because the verdict is decidedly against the weight of evidence.

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3d. Because the verdict is contrary to the charge of the Court, in this: The Court charged that if Hemphill, at the sale made by the Sheriff, said or procured another to say, anything that prevented others from bidding for the land, then his purchase was fraudulent and void, and they ought to find for the plaintiff.

4th. Because the Court erred in refusing to permit Andrew J. Hansell, Esq., to prove that William Smith, the Sheriff, who sold the land, testified on a former trial of this case, that at the sale, Thornton Harper was present and told him, Smith, that he intended to bid for the land and would give two hundred dollars for it, but that in consequence of a statement made by him, Smith, at Hemphill's request, that he, Hemphill, had bought the land and paid for it, and was only selling it to perfect titles, Harper would not bid for the land.

5th. Because the Court erred in charging the jury, that the execution being found among the papers of Jehial Jackson, the intestate, after his death, was not even *prima facie* evidence of its payment.

The Court overruled all the grounds and refused the motion for a new trial, and plaintiff excepted.

W. AKIN; and D. MITCHELL, for plaintiff in error.

UNDERWOOD & SMITH, *contra*.

By the Court.—BENNING J. delivering the opinion.

The question is, was the Court right, in overruling the motion for a new trial.

The fourth ground of the motion was, we think, good. The exclusion of the testimony of A. J. Hansell, was put on the ground, that he could not give the very words of the deceased witness, Smith, although he could give their substance. We think it sufficient, in such a case, that a witness can give the substance of the words. Few persons have

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memories to enable them, to give the exact words; and when a person professes to do that, he subjects himself to some degree of suspicion. If the substance is not receivable, it is plain, that the evidence, in most of the cases, will be wholly lost. No law was read to show, that the very words must be given.

This, then, was a ground on which, the motion, we think, should have been granted.

The last ground is not true in fact—as we understand the bill of exceptions. The Court certainly told the jury, that the fact that the *fi. fa.* was in the possession of Jehial Jackson, the defendant in it, "might be used as a circumstance for the consideration of the jury," on the question, whether the *fi. fa.* had not been satisfied.

It is unnecessary to consider the other grounds.

Judgment reversed and new trial granted.

DAVIS T. RICHARDSON, et al., plaintiff in error. vs. WASHINGTON HARTSFIELD, defendant in error.

- [1.] An exception to an award will not be entertained, unless it is warranted by the facts in the record.
- [2.] The affirmative declaration in the Act of 1856, that the arbitrators may adjourn from day to day, does not, perhaps, necessarily exclude the idea, that they may adjourn for a longer time, should the exigencies of the case require it.
- [3.] The failure of the arbitrators to sign the award on the day on which it is agreed to, does not affect its validity.

Arbitration and award, from Upson county. Tried before Judge CABANISS, at November Term, 1858.

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This was a motion by Washington Hartsfield, to enter an award of arbitrators on the minutes of the Court, and to make the same the judgment thereof. To which motion D. T. and F. M. Richardson, the other parties to said award, objected, and filed their exceptions thereto.

The following is the submission under which said award was made:

"STATE OF GEORGIA, UPSON COUNTY.

This indenture of arbitration made this thirty-first day of March, in the year of our LORD 1858, between Washington Hartsfield of the one part, and Davis T. Richardson and Francis M. Richardson of the other part, (and all being of said county of Upson,) is such that whereas, the said Davis T. and Washington, in 1847, entered into a copartnership in the mercantile business in the town of Thomaston in said county, which they continued and carried on under the name of Richardson & Hartsfield, in said town, until 1st January, 1851, at which time Francis M. Richardson was taken as an equal partner in said business, and then the business went on to 1st January, 1853, under the name of Richardson, Hartsfield & Co., on which day Washington Hartsfield sold out his interest in the stock of merchandise then on hand belonging to Richardson, Hartsfield & Co., to the said Davis T. and Francis M., who continued business under the firm, name and style of D. T. & F. M. Richardson.

And whereas, the business of said firms of Richardson & Hartsfield and Richardson, Hartsfield & Co., and of the firm just named with the firm of D. T. & F. M. Richardson, has become so confused and complicated, that controversies have arisen between the said Washington Hartsfield on the one side, and the said Davis T. and Francis M. Richardson on the other side, involving the transactions of the several partners had, in and touching the business of each of said firms, and also involving the transactions of said firm of Richardson, Hartsfield & Co., affecting the business and interest of

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said firm of Richardson & Hartsfield, and its said members, which in any wise affect the interest of either of the other named firms.

And whereas, it is the desire of the partners to settle and adjust all matters and points in controversy between them, without resorting to a suit in chancery for that purpose.

Now this indenture witnesseth, that the said Washington of the one part, and the said D. T. and F. M. Richardson of the other part, have agreed, and by these presents do agree, to submit all matters in controversy between them in the premises, to arbitrators, to discharge the duties of their trust under and according to the provisions of an Act entitled 'An Act to authorize persons to submit controversies to arbitration, declaring how arbitrators shall be chosen,' &c., approved March 5th, 1856, and that the said Washington chose James M. Smith, and the Richardsons chose Wm. G. Horsly.

The parties further agree, that the following shall be the matters in controversy to be passed upon and settled by the award of the arbitrators in said case:

1st. It is alleged by the said Washington, that the said Davis T. is indebted to him upon account being had and made between them of the affairs and their several transactions of the business of the said firm of Richardson & Hartsfield ; which allegation is denied by the said Davis T., said arbitrators chosen, together with the third arbitrator to be chosen according to the provisions of said Act, shall hear the evidence which may be adduced by the parties illustrating the question made upon said allegation ; and their award shall include as part thereof, what they shall find the truth in said question to be.

2d. It is alleged by the said Washington, that by the understanding and agreement of the parties, that said Francis M. took no interest in Richardson & Hartsfield's effects, except in the stock of merchandise ; but that notwithstanding this, the effects which belonged properly and of right to said firm of Richardson & Hartsfield, and were used by said

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firm, so that Richardson, Hartsfield & Co. are legally indebted to Richardson & Hartsfield; the truth of which is denied by the said D. T. and F. M. Richardson; the arbitrators shall hear the evidence, and determine what they find the truth to be, their award shall embrace the same.

3d. The said Washington alleges, that the said Davis T. and Francis M., and each of them, have applied to their own individual uses, and to the use of the firm of D. T. & F. M. Richardson, large sums of money belonging to Richardson & Hartsfield and Richardson, Hartsfield & Co.; and that each of them have thus become indebted to said firms of Richardson & Hartsfield and Richardson, Hartsfield & Co; the truth of which is denied by D. T. & F. M. Richardson; the arbitrators shall hear the evidence produced by the parties, and shall award their opinion as they find the truth to be of the question made under this specification.

The arbitrators shall ascertain from the evidence adduced by the parties on the trial, the actings and doings of the parties in the transactions of the business of the said several firms, and shall determine how the balance stands between the partners in each of said firms, and shall award such balance or balances as they may find in favor of the party whom they may think entitled thereto—the object and purpose of the parties being to make a full account and settlement between said parties, of all and singular the affairs of each and all of said firms.

WASHINGTON HARTSFIELD, [L. s.]
DAVIS T. RICHARDSON, [L. s.]
F. M. RICHARDSON, [L. s.]

Signed and sealed in the presence of

J. W. STEPHENSON,

A. WORRILL.

Attest to F. M. Richardson's signature,

JIM JOHNSON,

JNO. W. SMITH."

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These arbitrators made in substance the following award:

"We are of opinion, that Francis M. Richardson, when he became a member of the firm of Richardson, Hartsfield & Co., purchased no interest in any of the property or effects of the firm of Richardson & Hartsfield, except the stock of goods and the store-house and lot where the said Richardson & Hartsfield carried on business, for which he gave his notes to the said Washington and the said Davis T., which notes we find to have been collected, and divided equally and properly, between the said Washington and Davis T."

"We are further of the opinion, that effects which belonged properly and of right to the firm of Richardson & Hartsfield, were carried into the business of the firm of Richardson, Hartsfield & Co.; but what specific effects and to what amount, the proofs do not disclose. We cannot, therefore, find any amount in which the firm of Richardson, Hartsfield & Co. is indebted to the firm of Richardson & Hartsfield. We are further of the opinion, that shortly after the said Washington dissolved his connection with the firm of Richardson, Hartsfield & Co., the whole of the assets and effects which were then of the firm of Richardson, Hartsfield & Co., went into the hands of D. T. & F. M. Richardson, and that the said Davis T. and Francis M. are properly chargeable therewith."

"We find and award, that Washington Hartsfield recover of Davis T. Richardson and Francis M. Richardson, the sum of three hundred and forty-seven dollars and thirty-eight cents, his share of the assets and effects of Richardson, Hartsfield & Co. which went, as aforesaid, into their hands, and which they have failed to account for. The above award closes up the respective accounts of all the parties on the books of said firm of Richardson, Hartsfield & Co."

"We further find and award, that Washington Hartsfield do recover of Davis T. Richardson and Francis M. Richardson, the sum of nineteen hundred and sixty-nine dollars and twenty-two cents, his proportion of the assets which went, as aforesaid, into the hands of the said Davis T. and Francis M.

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Richardson, which are unaccounted for, belonging to the said firm of Richardson & Hartsfield. This award closes up and fully settles all the accounts of the parties on the books of the said firm of Richardson & Hartsfield. The outstanding indebtedness of each of said firms shall be settled by the members of the respective firms."

"The assets of each of said firms now on hand, (except the accounts of the partners hereinbefore settled and disposed of,) shall be equally divided under the direction of the Judge of the Superior Court of said county of Upson."

"We further award, by agreement entered on said submission, the sum of six hundred and thirty-five dollars, to be paid in equal parts by the parties in controversy, to the arbitrators, for their compensation in this case. And further, that the costs of this cause be paid equally by the parties.

June 16, 1858.

(Signed)

JAMES M. SMITH, [L. s.]

WM. G. HORSLY, [L. s.]

EDMUND A. SPIVEY, [L. s.]"

To entering this award on the minutes, and making it the judgment of the Court, the Richardsons objected, and excepted on the following grounds:

- 1st. Because the same is no award.
- 2d. Because the same is no award of the matters that were referred to the arbitrament and decision of the arbitrators.
- 3d. Because said award fails to find or decide whether Davis T. Richardson is or is not indebted to Hartsfield upon account had between them of the affairs of the firm of Richardson & Hartsfield.
- 4th. Because said award fails to ascertain and determine and award how the balance stands between Hartsfield and Davis T. Richardson, as also between Hartsfield and Davis T. and Francis M. Richardson, in each of said firms.
- 5th. Because said award fails to ascertain and declare what the assets of each of said firms, on hand, are, as also in whose

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hands said assets are, and makes no division of the same, and is not final nor certain, and requires the further action of this Court to settle and determine the matters in dispute which were referred to the arbitrators.

6th. Because the proceedings of the arbitrators were not in conformity with the Act of 1856, in this, that said arbitrators, without adjournment from day to day, and without adjournment to a particular day, after the evidence was closed, failed to proceed, but suspended action for the space of six weeks, and did not make up and sign the same until the expiration of that term, and said arbitrators thereby lost jurisdiction of the matters submitted to them.

7th. Because the present Term of the Superior Court is not the next Superior Court of the county of Upson, after said award was made.

The Court overruled the objection and exceptions to said award, and ordered the same to be entered on the minutes of the Court, and made the judgment thereof; and counsel for the Richardsons excepted.

O. C. GIBSON, for plaintiffs in error.

J. W. GREEN, *contra.*

By the Court.—LUMPKIN J. delivering the opinion.

We have examined carefully the exceptions filed to the award in this case, and concur with the Court below, that they are not sufficient to prevent the award being made the judgment of the Court.

[1.] As to the first exception, the arbitrators expressly declare, that the amount of \$1,900 found against the two Richardsons, on account of the assets of the first firm of Richardson & Hartsfield, closes up and settles the accounts of the partners on the books of said concern.

[2.] The second exception, we think, is not well taken in

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point of fact. The submission did not require the arbitrators to find what amount of assets belonging to each firm were on hand, and in whose hands they were, and to divide the same, but to settle the indebtedness of the several parties growing out of the business of the several firms. And that they have done. But they do award that all the assets on hand shall be equally divided, under the direction of the Court. And why cannot this part of the award be made the judgment of the Court, and persons appointed to make the division, provided the parties fail or refuse to make it themselves?

[3.] As to the exception taken to the unauthorized adjournment by the arbitrators themselves, before the award was made, it is not sustained by the record. But concede that it was ; the award was made, and the arbitrators merely delayed to sign it, for the reason set forth in the record. Besides, Davis T. Richardson, one of the firm of Davis and Francis Richardson, assented to the delay. Moreover, the affirmative declaration in the statute, that the arbitrators may adjourn from day to day, does not exclude necessarily the right to adjourn for a longer time, should the exigencies of the case require it.

Judgment affirmed.

THE EAST TENNESSEE & GEORGIA RAILROAD COMPANY, plaintiff in error, vs. ALBERT G. WHITTLE, defendant in error.

If a railroad company hires or charters cars to any one, absolutely, the hirer cannot look to the company for damages in case of injury to his property as a common carrier. His remedy for injuries must be on contract of hire, and the implied undertaking of the company, that the hired cars are substantial and will be duly carried to their point of destination, &c., &c.

East Tenn. & Ga. R. R. Co. vs. Whittle.

Case, from Whitfield county. Tried before Judge TRIPPE,
at October Term, 1858.

This was an action on the case brought by Albert G. Whittle, against the East Tennessee & Georgia Railroad Company, for the recovery of damages for a lot of hogs belonging to Whittle, which were suffocated and killed in the cars of defendant, in and upon which they were shipped at Cleaveland, Tennessee, to be transported to Dalton, Georgia.

The defence was, that the plaintiff chartered from defendant, the cars in which his hogs were shipped ; that said cars were under his control, and he superintended and directed the loading of the same, and the hogs were suffocated by plaintiff's crowding too many into one car, and were thus lost by plaintiff's own want of care, and not by any misconduct, or default on the part of the railroad.

The jury found for the plaintiff five hundred and twenty dollars.

Whereupon, defendant moved for a new trial, upon the following grounds :

1st. Because the verdict is contrary to law and evidence, and strongly and decidedly against the weight of the evidence.

2d. Because the Court erred in charging the jury, that the chartering the cars by the plaintiff, did not give him the control thereof or make him responsible for the consequences of over-loading them ; that the only effect of his chartering the cars, was to give him a right to have his hogs shipped in them, to the exclusion of others, and the railroad company was just as liable as though there had been no chartering, and the hogs had simply been delivered for shipment, as in ordinary cases of goods ; and the control resulting from the chartering, did not in the least lessen the company's liability.

3d. Because the Court erred in charging the jury, that the chartering the cars did not give to plaintiff the right to superintend or control this loading, or make him responsible for

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overloading, and for any injury arising, in consequence thereof. That the company was liable for all the consequences of such overloading, and that it was the duty of the road to see to it, that the cars were not overloaded, or too many hogs put in them; and if the plaintiff insisted on putting in too many, it was the duty of the company to prevent him, and also, not to allow him to close the doors too closely. This whole duty and responsibility were upon the company, and not upon the plaintiff.

4th. Because the Court after charging the general rule as requested by defendant's counsel, that if both parties are equally guilty of negligence, or if neither was guilty, then the defendant is not liable, added that this principle did not apply in this case, because plaintiff had no right to control the cars or the loading thereof, but defendant had, and was therefore the only party responsible for the injury.

5th. Because the Court erred in charging the jury, that the contract of chartering did not lessen the liability of the railroad company, and this liability must be determined upon the principles which ordinarily govern the liability of common carriers.

6th. Because the Court erred in deciding upon the effect of the testimony, and in charging the jury, that it was the duty of the company not to close the doors of the cars, but that it ought to have slatted up the doors, whether it was the contract or not, if it was necessary for the safety of the hogs; [defendant's counsel insisting, that what attention was necessary, was a question of fact for the jury, and not for the Court.]

7th. Because the Court refused to charge as requested by defendant's counsel, that if the jury believed from the evidence, that the plaintiff chartered the cars, that it gave him the right to put as many or as few hogs in them as he pleased, (provided he did not exceed in weight, what was allowed each car.)

8th. Because the Court refused to charge as requested by defendant's counsel, that the contract of chartering a car,

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was a sale of it by defendant to plaintiff for the trip, and that defendant was not liable for any injury plaintiff sustained by overloading or crowding it with hogs, if plaintiff superintend did the loading, or it was done under his direction.

9th. Because the Court erred in refusing to charge as requested by defendant's counsel, that where a party charters a particular car, which he sees, and has a knowledge of its quality, defendant is only liable for negligence in running the car, or for its giving out or other negligence not connected with the loading thereof; that being under the control and direction of plaintiff.

10th. Because the Court erred in refusing to charge, as requested by defendant's counsel, that if the plaintiff superintended the loading, and had the control thereof, and the injury occurred by putting too many hogs in the cars and shutting the doors too closely, then defendant was not liable.

11th. Because the Court refused to charge, as requested by counsel for defendant, that if the jury believed that plaintiff was notified by an officer of the road, that he was putting too many hogs in, and that, in disregard of such notice, he put in too many, and thereby caused the injury, defendant is not liable.

12th. Because the Court erred in rejecting the testimony offered for the purpose of showing what was meant by a contract of *chartering a car*, the Court holding that it would determine the rights and liabilities of the parties under the contract as proved.

13th. Because the Court erred in charging the jury, that the measure of the damages in this case was the value of the hogs, at the time and place, when and where shipped, together with the loss occasioned by reason of plaintiff's detention and expense incurred on account thereof.

14th. Because the Court erred in charging the jury, that although the plaintiff chartered box cars, and saw them before he chartered them, and knew their character, still it was

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the duty of the railroad company so to have prepared them, as to ship the hogs safely, and if plaintiff was about to put in too many hogs, it was the duty of defendant to prevent it, and either to have refused to carry the hogs, or compelled him to charter another car.

The Court, after agreement, refused the motion for a new trial, and counsel for defendant excepted.

D. A. WALKER, for plaintiff in error.

C. D. McCUTCHEON, *contra.*

By the Court.—McDONALD J. delivering the opinion.

The plaintiff in error was sued as a common carrier in the Court below, and the proof established the fact, that the defendant in error chartered of the said plaintiff, two box cars for the transportation of hogs from Cleaveland, in Tennessee, to Dalton, in Georgia. The hogs were put on board the cars at Cleaveland, were shut up, and many of them suffocated on that night, before the train of cars was put in motion on its trip.

The principal question arising upon the pleadings and evidence, and the rulings and decisions in this case, is whether the plaintiff in error is liable for damages as a common carrier.

A railroad company, from the nature of its occupation is a common carrier, unless there is something in its charter to relieve it from the heavy responsibilities of that character. It is conceded that there is nothing in the charter of the plaintiff in error to restrict or limit its liability in that respect. But because it is a common carrier, and has an exclusive right of transportation of passengers and freights over its road, in its own cars, and by means of its own motive power, does that deprive it of the right to charter or hire an entire train, or any part of it, to another company or an individual? If

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it does not, and it charters the whole, or a part of its train, so as to give up the possession of the part chartered to the charterer, is the company liable, as a *common carrier*, for damage or injury to property put into the chartered cars?

A ship may be chartered in whole or in part to another. *Story's Ed. of Abbot on Shipping*, 210, top page. Whether the owner or charterer is liable as a carrier for the damage, depends on the terms and construction of the charter party, &c. That depends entirely on, whether the owner of the vessel or the charterer has possession of the merchandise or commodity to be transported. There must be a trust and confidence in the owner, manifested by the delivery into his possession of the article to be transported, before he can be charged as a common carrier. In the case of the *East India Company vs. Pullen*, where the defendant was sued as a common lighter-man on the Thames, it was the usage of the company to place an officer, called a guardian, in the lighter; the Court held, that "it altered it from the common case, there being no trust in the defendant, and the goods were not to be considered as ever having been in his possession, but in the possession of the company's servant, who had *hired* the lighter to use himself." 1 *Strange's Rep.*, 690. In most of the cases which have arisen under charter parties in England, the principal question arising under the construction of the contract has been, "whether there was an entire letting or parting with the ship for given purposes, so that, during that time the owner had no efficient control, but the charterer had the full disposition of the ship." *Paa h J.*, in the case of *Christie vs. Lewis*, 6 *Com. L. Rep.*, 186. If there was an entire letting or parting with the ship, the charterer became the owner for the time, and the ship was delivered to him, and not the freight to the owner. If the ship is chartered or hired in a manner, that the charterer shall retain the possession of his own merchandise or articles for transportation, the owner of the ship can have no lien thereon for the freight or the payment of the sum stipulated for the use of the ship, for there can be

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no lien where there is no possession. When the owner of the ship has neither the possessor of the articles to be transported, nor a lien for freight, as to them, he cannot be a common carrier. But it is said, there is a difference between the chartering or hiring of a ship, and of a railroad car; that the charterer of a ship may sail where he pleases on the seas, and there are no exclusive rights and privileges to limit his power or control his movements, but in respect to the charterer or hirer of a railroad car, it is not so. Grant it, that there is a difference; that does not restrict the right of the parties to make a contract, and if it be a contract which violates no principle or policy of the law, it will surely bind the parties to it; and if the parties make a contract, and it be in relation to a new condition of things, it must be construed by known and established principles, applied to such new state of things. A railroad train is made up of separate cars, cars capable of being let or hired separately, but all are necessarily obliged to pass over the same route, and to be drawn by the same power. The power which moves it from place to place is owned by the proprietors of the road, unless the whole train with the power and employees be let, and then the ownership is temporarily changed. If the whole train, including motive power, or a part of a train be *absolutely* chartered or hired to another for a particular trip, or from one place to another, without further stipulation expressed, and the possession is delivered, that other becomes the owner for the time, and has the right to control the freighting and loading of the chartered or hired cars. There is always and must be in such contracts, certain implied undertakings by both parties; on the part of the hirer, that he will not overload the car, or freight it in a manner to injure it, &c.; on the part of the owners, that the car is in good condition, and substantial; that it will be carried safely, and in the usual time, to the point of its destination; that, if laden with stock, time and opportunity will be afforded to give them proper attention, &c., &c. For a breach of any of these implied engage-

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ments, the injured party would undoubtedly have a remedy to recover damages from the other for the injury sustained. *Hamlock vs. Giddes*, 10th East. Rep., 555.

But it is insisted in this case that the possession of the hogs was delivered to the plaintiffs in error, because they retained the management of the train, that their employees controlled it, and that they are liable as common carriers. What we have already said, might perhaps, be sufficient to this point, but we will refer to the dissenting opinion of *Dallas C. J.*, in the case of *Christie vs. Lewis* already cited, and to the authorities there referred to, in support of the proposition that "a ship may be let with a stipulation, that she may continue to be navigated in all respects as before, and the services of the master, and the crew may be let together with the ship;" 6th Com. L. Rep., 184. There is nothing in the decision to controvert this proposition. If it may be done in the case of a ship, it may be done in the case of the railroad car.

One of the witnesses in this case testified, that the defendant in error chartered the cars, another, that he hired them without further agreement, except that the agent of whom he hired them promised or agreed to have the doors slatted, so as to admit the free circulation of air as far as it was practicable in a box-car. The defendant superintended the loading of the cars, and determined to have all his hogs put in two cars, which he had been cautioned against as dangerous. The agent of the road did not control him, or attempt to control him in that, and he had the perfect right to do it if he had hired the car. But it is said that the car doors were not slatted agreeable to the agent's undertaking. That is true, and if the damage to the hogs was attributable to that omission, the plaintiff in error is liable to damages for a breach of that contract. It was urged that the defendant in error was present and witnessed the manner in which the hogs were put in, and the cars secured, and acquiesced. There is no evidence that the agent was ever released from his undertaking.

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It is in evidence that all the agents of the road were aware that the hogs were in danger of suffocation in such close confinement, and it was certainly the duty of the agent, under his agreement, to slat the doors before the heat and suffocation of the hogs. There is no evidence that the defendant in error had waived it, or that his consent to securing the doors, in the manner they were closed, was any thing more than an expedient to prevent the escape of the hogs, until the slatting would be done.

The defendant in the Court below read as evidence to the jury, parts of the freight list, for what object is not very apparent, if there was an express contract for the hire or charter of the cars independent of the statements in the freight list, restricting the company's liability for the transportation of stock, &c., and fixing the price of freight by the car load. If it was offered as evidence of the contract, and there was no contract of charter or hire, other than what was to be inferred from the notice and the delivery of the hogs on the cars, I am of opinion, that such a notice does not make a contract.

In delivering the opinion of the Court in the case of the *Central Railroad and Banking Company, vs. Hines, Perkins & Co.*, 19 Ga., 210, speaking of the doctrine of notice and special acceptance by a common carrier, I remarked, that "a party to a contract cannot of his own will, change the law of that contract, nor can a man by giving notice abrogate the law or change a rule of law, which attaches to the business, in which he is engaged, a peculiar liability. But we are not to be understood to say, that he may not make a contract, when he makes it on equal terms with those with whom he deals, to mitigate the hardships of a legal rule, which exposes him to apparently unreasonable liabilities, when that contract is not forbidden by any principle of the statute or common law." If there was evidence submitted to the jury to prove both propositions, viz: 1st. that there was an express contract of charter or hire of the two cars on which the hogs were put, by the terms or construction of which the plain-

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tiff, in error divested themselves of the liabilities incident to the business of a common carrier; and 2d. that if there was no such express contract, yet the plaintiff in error had restricted their liability in that respect, in their published bills of freight, by which they insisted, the defendant in error was bound, the Court ought to have charged the jury and submitted to them the law in both aspects of the case.

The presiding judge did present his view of the law on the first of the above points to the jury very fully, but from what we have said, it will be seen that in our judgment he committed error in his said charges as it is represented in the second, third, fourth, fifth, sixth and fourteenth grounds taken in the motion for a new trial. We think also, that the requests made of the Court below in writing, to charge the jury as set forth in the seventh, eighth and eleventh grounds, in the motion for a new trial, ought to have been given. It must be understood that we speak of such an unqualified chartering or hiring as the evidence in this case, in one aspect of it, presents; for the charge, and the requests to charge, must be understood in reference to the proof in the case. It will be understood, that if there was no contract of charter or hire other than what is to be inferred from the published rates and rules of transportation as given in evidence by the plaintiff in error, then the plaintiff in error is liable as a common carrier; but we must construe the charge and the requests to charge by the proofs as exhibited in the record, and two or three of the witnesses prove that there was a chartering or hiring of the cars.

Judgment reversed.

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JOHN DOE, *ex dem.*, AMBROSE K. BLACKWELL; and REUBEN F. DANIEL, plaintiffs in error, vs. RICHARD ROE, casual ejector and NANCY BIRD, tenant in possession, defendant in error.

When the matter in issue is, whether or not the defendant was served, the jury are authorized to infer that he was not, from the fact that no attempt was made to enforce the judgment, for some fifteen or twenty years after it was rendered; and the defendant continuing all that time in the adverse possession of the premises.

Ejectment, from Cherokee county. Tried before Judge HAMMOND, at September Term, 1858.

This was an action of ejectment by plaintiff in error, against the defendant in error, for the recovery of lot of land No. 114, in the fourteenth district, and second section of Cherokee county, containing one hundred and sixty acres.

The facts of this case, and the questions considered and decided, will fully appear from the following bill of exceptions, and the opinion pronounced by the Supreme Court:

GEORGIA, CHEROKEE COUNTY.

Be it remembered, that on the ninth day of September, 1858, during the regular Term of the Superior Court of said county, his Honor Dennis F. Hammond, one of the Judges of the Superior Courts of said State, presiding, the cause of John Doe, on the several demises of Ambrose K. Blackwell, and Reuben F. Daniel, plaintiff, vs. Richard Roe, casual ejector, and Nancy Bird, tenant in possession, defendants, then and there pending on the appeal, on the law side of said Court, being an action of ejectment, came on to be heard, and the parties having announced themselves ready, and a jury being regularly impannelled to try said cause, plaintiff offered in evidence the following testimony, to-wit:

An original grant from the State of Georgia, to Ambrose K. Blackwell, one of the lessors of the plaintiff, for the pre-

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mises in dispute, dated 6th January, 1853, copy of which is as follows:

“ STATE OF GEORGIA.

By His Excellency, Howell Cobb, Governor and commander-in-chief of the army and navy of this State, and of the militia thereof:

To all to whom these presents shall come, greeting:

Know ye, that in pursuance of an Act of the General Assembly, approved January 22d, 1852, to limit the time for taking out grants to the State's half and informer's half of any lot of land fraudulently drawn, in any of the land and gold lotteries of this State, and to provide for the granting of the same after the expiration of said time, I have given and granted, and by these presents, in the name and behalf of this State, do give and grant unto Ambrose K. Blackwell, of the county of Cherokee, his heirs and assigns forever, all that tract or parcel of land containing one hundred and sixty (160) acres, situate lying and being in the fourteenth district of second section Cherokee county, in the said State, it being the State's and informer's half of lot number one hundred and fourteen (114) of said district, section and county, having such shape, form and marks as appear by a plat of the same hereunto annexed; to have and to hold the said tract or parcel of land, together with all and singular the rights, members and appurtenances thereof, whatsoever, unto the said Ambrose K. Blackwell, his heirs and assigns to his and their own proper use, benefit and behoof, forever in fee simple.

Given under my hand, and the great seal of the State, this thirteenth day of January, in the year of our Lord one thousand eight hundred and fifty-three, and of the independence of the United States of America the seventy-seventh.

HOWELL COBB, [seal].

Signed by His Excellency, the Governor, this 13th day of January, 1853.

W. W. PAINE, *Secretary Executive Department.”*

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Which original grant, with the plat annexed thereto, was read in evidence without objection.

Plaintiff also proved by Hammett, that Nancy Bird was in possession of the premises in dispute, at the time suit was commenced, and at the time the process was served on her in said case, and that the lot of land sued for, was situate in said county of Cherokee.

Plaintiff also offered in evidence, the following testimony, to-wit: An acknowledgment on the writ in said case in the following words and figures, to-wit: "I acknowledge due and legal service of this declaration, waiving a copy and service by the Sheriff, also waiving copy process, and admit and acknowledge possession of premises and land sued for in this declaration, this 13th of July, 1853; that is, that Nancy Bird was, and is in possession of the land only.

D. H. BIRD, *attorney for
NANCY BIRD.*"

Which acknowledgment and admission was read in evidence without objection.

The plaintiff then rested his case.

The defendant, Nancy Bird, then offered in evidence, the following testimony, to-wit: An original grant from the State of Georgia to Nancy Holland, widow, for the premises in dispute, dated twenty-fifth day of February, 1834.

A deed from Nancy Holland to John Wagoner, for the premises in dispute, dated the twenty-fourth day of December, 1835, with proof of its due execution.

A deed duly executed and registered, from John J. Cook, Andrew Wagnon, John Wagnon, Jr., Peter Wagnon, and John Wagnon, Sr., to John G. Bird, for the premises in dispute, dated fourth day of July, 1845; deed duly executed and registered, from John Wagnon, Sr., to Andrew Wagnon, for "all that tract of land situate lying and being the south of lot" of land the premises in dispute, "marked by a conditional line from east to west, through said lot," dated 6th December, 1843.

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A deed duly executed and recorded from John Wag-
non, Sr., to John J. Cook, Jr., for that portion of the premises in
dispute, " being the north side of said lot, marked by a con-
ditional line from east to west, through said lot;" said deed
dated the sixth day of December, 1843.

All of which deeds and grant were read in evidence without objection; said defendant having proven by said Hammett, the witness aforesaid, that Nancy Bird, the tenant, was the wife, and now widow, of John G. Bird, and remained in possession of said lot of land, as such, after the death of the said John G. Bird. Said Nancy Bird also proved by one Elijah Hillhouse, a witness, that John Waggoner and John Wagnon, mentioned in said deeds were one and the same person.

The defendant then rested her case.

Plaintiff then offered in evidence, the following testimony, from the minutes of the Superior Court of September Term, 1836, to-wit:

"The Governor, on the information of
JOHN WAGGONER vs. NANCY HOLLAND, *Scire facias* on lot
No. 114, 14th dis-
trict, 2d section.

"We the jury" (here follow the names,) "find the return
fraudulent, 12th September, 1836.

GEORGE M. TAYLOR, *Foreman.*

Which was read from the minutes without objection.

Plaintiff also offered in evidence, the affidavit and bond of the informer, and the *scire facias* issued thereon, to condemn, as fraudulent, the return and draw of said lot, by said Nancy Holland.

The following entries were on the back of the *scire facias* and bond, which plaintiff offered in evidence, to-wit:

"OFFICE OF THE CLERK OF THE SUPERIOR COURT,
of Cherokee County Georgia."

I, William Grisham, Clerk of the Superior Court, of the county aforesaid, do hereby certify, that John Waggoner, the informant, has made and deposited in this office, an oath

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in writing, that in making this information he has no combination or understanding directly or indirectly, with the drawer or any other person as the friend of, or on the part of the drawer, and it also duly appears that he has given bond and security in the sum of two hundred dollars, to the Justices of the Inferior Court of this county, conditioned to indemnify the individual drawer of the within mentioned tract of land, and for all damages she may sustain, provided the said land is not condemned as fraudulent. The said affidavit and foregoing *scire facias* filed in this office the 27th day of January, 1835.

WILLIAM GRISHAM, Clerk.

We the jury find the return fraudulent, this 12th September, 1836.

GEORGE M. TAYLOR, Foreman."

"*Substituted in lieu of the original, lost after being served.*"

"Whereupon, it is considered by the Court, that the return be fraudulent, the draw of said lot be void, and that the grant issued upon said return be set aside, and that the informer recover of the defendant the sum of dollars and cents for his costs in this suit laid out and expended, and the defendant in mercy, &c. This 14th September, 1836.

WILLIAM DANIEL, Plaintiff's At't'y."

To which affidavit, bond and *scire facias*, with the said entries thereon being admitted in evidence, counsel for the defendant objected, on the ground that said *scire facias* was not an original, but a copy *scire facias*, and that it did not appear that there was any order of the Court establishing said copy *scire facias*, in lieu of the lost original, and because it did not appear that the defendant had ever been served with said *scire facias*. The Court sustained the objection, and ruled out the testimony, and counsel for plaintiff excepted.

The plaintiff then proposed to read in evidence, the record

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of said bond, affidavit and *scire facias*, and the said entries thereon, to which defendant's counsel objected on the same grounds as above. The Court sustained the objection, and ruled out the testimony, and plaintiff's counsel excepted.

The plaintiff then proposed to prove by William Grisham, that he was Clerk of the Superior Court of Cherokee county, at the time that said *scire facias* was tried, and that the entry on said copy *scire facias* of "*substituted in lieu of the original, lost after being served,*" was made in the presence of, and by the consent of the Court, and was considered . the order of the Court, and that the case proceeded to trial regularly, though he could not recollect, at this late day, all that was done, nor could he recollect any special decision of the Judge establishing said copy *scire facias*, but that the entry aforesaid, was regarded as having the sanction and approval of the Court, and that the practice in that day was very loose.

To this testimony, defendant's counsel objected, on the ground, that the action and order of the Court could not be proven in that way, but that the minutes must show what the Court did. The Court sustained the objection, and ruled out the testimony, and counsel for plaintiff excepted. The plaintiff then proposed to prove the facts aforesaid by the Clerk, and also to prove by the answers of Robert Mitchell, to interrogatories taken in the cause that he had seen "the original of the said copy *scire facias* several times, and examined it carefully and particularly in the year 1835, and perhaps in the year 1836 also, and that his best recollection is, that he left said original *scire facias* in his office at Gainesville, which office was burned up with said original *scire facias*, if left there, and that said original *scire facias* was served on Nancy Holland, or at least had an entry of service on the same, made either by Abraham Chastain, or Jacob Ebberhart, one of whom was Sheriff and the other Deputy Sheriff of Hall county at the time. His best recollection is, that the entry of service was signed by

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Ebberhart, and that his means of knowing the facts are derived from having been at one time interested in the case, of but now has no interest in it." And upon the basis this testimony the plaintiff moved to enter the order establishing said copy *scire facias* on the minutes *nunc pro tunc*, which motion was overruled by the Court, and the testimony repelled, and counsel for plaintiff excepted.

The plaintiff then offered in evidence, an Act of the General Assembly of the State of Georgia, assented to the 31st of December, 1838, the first section of which is as follows, to-wit:

"Be it enacted, by the General Assembly, and House of Representatives, of the State of Georgia, in General Assembly met, and it is hereby enacted by the authority of the same, That the Sheriff of Cherokee county be required to give notice in one of the public Gazettes of this State thirty days, that he will sell at public outcry, on a given day, before the Court-house door, in the town of Canton, Cherokee county, lot of land number one hundred and twenty-two, in the 14th district of the second section, which was drawn by W. A. Crumbie, and relinquished by him to the State, and also the State's interest in lot number one hundred and fourteen, in the fourteenth district of the second section, *which was drawn by one Nancy Holland, and which has been condemned as a fraudulent draw*, and when so sold by said Sheriff he shall pay the proceeds arising from the sale of said land after deducting two per cent. for selling, and the advertisement, to the Treasurer of said county of Cherokee, and it shall become a part of the county fund," which Act was read in evidence, without objection.

The cause being closed, counsel for the plaintiff requested the Court to charge the jury, that after the expiration of twenty years from its date, the judgment of a Court of competent jurisdiction is conclusively presumed to have been properly rendered, and upon the evidence required by law, although the record did not show every progressive

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step and requisite of the judgment, and that in this case, if the minutes of the Court showed a verdict condemning the land in dispute as having been fraudulently drawn by Nancy Holland, the jury might presume that that verdict, especially after the lapse of twenty years, was rendered upon proper and sufficient notice to the defendant, and upon proper pleadings, and upon competent and sufficient evidence. The Court refused to charge, as requested, but on the contrary charged the jury, that the record must affirmatively show that Nancy Holland was served with the *scire facias* before they could find her draw of the land a fraudulent draw; to which charge and refusal to charge, plaintiff's counsel excepted.

Counsel for the plaintiff also requested the Court to charge the jury, that an Act of the Legislature constitutionally passed and approved, was *prima facie* evidence of the facts recited in it, and that if the Act of the Legislature read in evidence in this case, recited as a fact that the land in dispute was drawn by Nancy Holland, and afterwards was condemned as a fraudulent draw, in the absence of all opposing proof to the contrary, such recitation was evidence of the fact recited. The Court refused to charge, as requested, but charged the jury, that the recitations of fact in said statute, were not sufficient to authorize the jury to determine the draw of Nancy Holland a fraudulent draw, even in the absence of all proof to the contrary. To which charge, and refusal to charge, counsel for plaintiff excepted.

The jury returned a verdict for the defendant, whereupon counsel for plaintiff, on this the 6th day of October, in the year aforesaid, being within thirty days from the adjournment of the said Court in which said cause was tried, tenders his bill of exceptions, and says:

1st. That the Court erred in rejecting and ruling out the original affidavit, bond and *scire facias*, with the entries thereon.

2d. That the Court erred in rejecting and ruling out as

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evidence, the record of said bond, affidavit and *scire facias*, with the entries thereon.

3d. That the Court erred in rejecting and ruling out the evidence of William Grisham, the Clerk of said Court, at the time said *scire facias* was tried.

4th. That the Court erred in rejecting and ruling out the depositions of Robert Mitchell.

5th. That the Court erred in refusing to allow plaintiff's counsel to enter *nunc pro tunc* on the minutes, the order establishing the copy *scire facias* in lieu of the lost original in said case.

6th. That the Court erred in refusing to charge the jury, as requested, respecting the legal presumptions in favor of judgments after the lapse of twenty years.

7th. That the Court erred in charging the jury, that the record must show affirmatively that Nancy Holland was served with a copy of the original *scire facias*, before they could find her draw of the land a fraudulent draw.

8th. That the Court erred in refusing to charge the jury, as requested, respecting the Acts of the Legislature, and the recitations therein, when constitutionally passed.

9th. That the Court erred in charging the jury, that the recitation of facts in the Act of 1838, which had been read in evidence on the trial of said case, was not sufficient to authorize the jury to determine the draw of Nancy Holland a fraudulent draw, even in the absence of all proof to the contrary.

10th. That the Court erred in the whole proceedings. And as the facts aforesaid do not appear of record, the plaintiff by his counsel, prays that this, his bill of exceptions, may be signed and certified as required by the statute in such case made and provided.

IRWIN & LESTER; and BROWN, for plaintiff in error.

HANSELL; and MILNER, *contra*.

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By the Court.—LUMPKIN J. delivering the opinion.

The whole of the testimony offered by the plaintiff in rebuttal, and rejected by the Court, should have been admitted. The recitals in the Act of the Legislature, are certainly entitled to some consideration; still, the testimony of Robert Mitchell, is the only direct proof to the fact of the service of the *scire facias*, all else is but inference and presumption; and Mr. Mitchell, after such a lapse of time, deposes more perhaps, from his knowledge as an attorney, as to what ought to have been done, than any distinct recollection, as to what was actually done.

On the other hand, Nancy Bird, and those under whom she claims, and who derive title from the drawer of the land, have never been out of possession; that possession, notwithstanding the verdict of the jury in 1836, declaring the draw fraudulent, and the Act of the General Assembly in 1838, ordering a sale of the land, was never disturbed until 1853; in other words, no attempt was made to execute the judgment of the Court, until sixteen years after it was rendered; and during all this time the occupation of the land, by the adverse claimant, was acquiesced in.

In weighing, then, the testimony in favor of the plaintiff, which was offered to perfect this record, the jury are at liberty to look to the length of the defendant's possession, since the proceedings were had under the *scire facias*; and the failure to enforce the judgment, as circumstances from which they have a right to infer, that Nancy Holland never was served with the *scire facias*, and without service, the judgment of condemnation is a nullity.

The *nunc pro tunc* order, substituting the copy *scire facias* for the original, would not strengthen the plaintiff's case, because there is no entry of service upon it by the Sheriff. The copy from the record is sufficient for all that it proves; under the *nunc pro tunc* order it could establish nothing more.

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As it respects the requests to charge, and the charges as given, we would say: that while the jury might infer from the verdict, that the pleadings were regular, it is not conclusive by any means, of the fact, even after the lapse of twenty years. Still we are not prepared to sustain the Court in ruling that service could be proven only by record evidence.

Finally, we concur with the Court, that the recitals in the Act of 1838, were not conclusive, unless rebutted, that Nancy Holland was served; and for the very obvious reason that the fact that she was served, the very thing in dispute is not recited or assumed to be true in the Act. Nevertheless, we repeat, the Act is worth something, because it is based upon the general assumption, that the lot of land was regularly and legally condemned as having been fraudulently drawn.

Judgment reversed.

JOHN DOE, ex dem., JEFFERSON JOHNSON and WIFE, plaintiff in error, vs. RICHARD ROE, cas. ejector, and AUGUSTUS R. WRIGHT and JOHN H. WALKER, tenants in possession, defendants in error.

- [1.] The Superior Court may direct an order, passed in 1831, to appoint a guardian *ad litem* for an infant, and which was not put on the minutes at the time to be entered thereon now for then.
- [2.] Evidence tending to prove that a judgment rendered against an infant, which judgment was offered and received in evidence, was null and void for the want of service, and for the want of a proper representative, and for other reasons, is admissible.
- [3.] If parties to writs of *scire facias* to avoid grants for lands alleged to have been fraudulently drawn, were not entitled in strict law, to appeal from ver

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dicts rendered against them, we will not upset the authoritative adjudications and practice of the Courts which decided upon the rights. It would unsettle titles to land to too great an extent to hold to the contrary of these adjudications now.

[4] The Court ought not to withdraw from the jury a judgment, because an entry of service on the writ on which the judgment was obtained, is not regular.

Ejectment, from Cass county. Tried before Judge TRIPPE, at September Term, 1858.

This was an action of ejectment brought by John Doe, upon the demise of Jefferson Johnson and wife, against Richard Roe, casual ejector, and Augustus R. Wright and John H. Walker, tenants in possession, for the recovery of lot of land No. one hundred and twenty-four, (124,) in the fifth district and third section of originally Cherokee, now Cass county.

This lot of land was drawn by Harriett Taff, (now Mrs. Johnson,) a minor, and to whom the grant from the State duly issued, dated 28th January, 1833.

Afterwards, in 1834, upon the information of James Kirkpatrick, that said drawing was fraudulent, *scire facias* was issued, and the Sheriff returned that he "served defendant, Harriett Taff, by serving her guardian, John W. Taff, with a copy" thereof.

Upon the trial, there was a verdict by the *petit jury*, that the return and drawing of said lot was *not fraudulent*. The informer appealed, and the verdict upon the appeal trial was, that the return *was fraudulent*. Upon this verdict judgment was entered, adjudging the grant issued to said Harriett to be void, and that the same be cancelled, and that said lot of land be partitioned—one-half to the State and the other half to the informer.

Afterwards, by consent of the informer, the Court ordered the land to be sold by the Sheriff of Cass county. Upon the sale thereof, William Harris became the purchaser, and Wright and Walker, the tenants in possession, adduced a regular chain of title from Harris down to themselves.

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Harriett Taff intermarried with Jefferson Johnson, and they bring this action for the recovery of this land, drawn as aforesaid by Mrs. Johnson.

The case being called for trial, counsel for defendants moved to enter on the minutes of the Court, the following order, viz:

"**JAMES KIRKPATRICK,**
vs. } *Scire Facias, in Cass*
JOHN W. TAFF, guardian, } Superior Court.
ad litem, of Harriett Taff. }

It appearing to the Court that the entry of "John W. Taff, appointed guardian, *pendente lite*," was made by the presiding Judge at the time—March Term, 1834—on the bench docket, in the above stated case, and it further appearing that a similar entry was made on the *scire facias*—that said entry and order was not placed upon the minutes of said Court, at that Term, by the Clerk of said Court, it is on motion, ordered by the Court that said entry be now entered on the minutes as of that time, by the Clerk, *nunc pro tunc*."

Counsel for plaintiffs objected to this order, the objection was overruled, and the order granted, and counsel for plaintiffs excepted.

Plaintiffs then submitted their proof. Offered and read in evidence the grant from the State to Harriett Taff, orphan of W. B. Taff, for the lot in dispute, dated 28th January, 1833; proved that defendants were in possession of the premises; that Jefferson Johnson and Harriett Taff intermarried on the 7th August, 1845.

Defendants proved that they had been in possession of the lot of land more than seven years before the commencement of this suit.

Defendants further offered in evidence, the records and proceedings in the case of James Kirkpatrick, informer, against Harriett Taff, in which there was the verdict and judgment, finding and condemning the return and drawing of said lot fraudulent.

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Plaintiffs, in reply, proved that Harriett Taff was the daughter of William B. Taff, of Houston county, Georgia; that William B. Taff resided in Houston county in 1826 or 1827, and continued there until his death in 1832; that Harriett was born in the year 1829 or 1830; that she was raised and lived in Houston county until her marriage with Johnson.

Plaintiff then proposed to prove:

1st. That John W. Taff, upon whom the *scire facias* purported to have been served, was never served with the same, and had no notice thereof.

2d. That said John W. Taff never accepted the appointment of guardian, *ad litem*; that he was not at Court when the order appointing was made; had no notice of it, and was never at Cass Court, and never appeared by attorney or otherwise, to defend said *scire facias*, and that the same proceeded to final judgment by default.

3d. That the entry of service on said *scire facias* was a forgery; and that the person by whom said service purports to have been made, to-wit: "C. F. Hemmingway, D. Sheriff," was not a Deputy Sheriff.

4th. That the guardian, *ad litem*, was appointed at the instance of James Kirkpatrick, the informer, and that he induced the Court to make the appointment of a stranger, who was not present, by stating that John W. Taff was the guardian in chief of Harriett Taff, and that this statement was false.

5th. That Harriett Taff was born in Houston county, and was never out of the State prior to her marriage in 1845.

Counsel for defendants objected to the admission of any testimony in proof of these facts. The Court sustained the objection, and counsel for plaintiffs excepted.

The testimony being closed, counsel for plaintiffs moved to exclude from the consideration of the jury, as evidence, the records and proceedings in the *scire facias*, upon the grounds: 1st. Because, under the Act of 1830, authorizing that proceeding, no provision is made for an appeal from the

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verdict of the petit jury, and the verdict of the jury, upon the appeal and judgment thereon, in said *scire facias*, as appeared by said records, were void and of no force.

2d. Because, by the Act of 1830, the said Harriett should have been served with a copy of said *scire facias*, in person, or by leaving it at her most notorious place of abode; and because said Act provides, that no return made by an orphan should be declared fraudulent until the legal guardian shall have been made a party to the *scire facias*, or other discreet person appointed.

The Court overruled this motion, and counsel for plaintiffs excepted.

Counsel for plaintiffs requested the Court to charge the jury as follows:

1st. That by the Act of 1830, in a proceeding by *scire facias*, to condemn fraudulent returns and draws, no appeal is allowed; and if an appeal be taken, the same is void, and the jury must find for the plaintiff.

2d. That by said Act, Harriett Taff, the drawer, and defendant in *scire facias*, should have been served personally, or by leaving a copy at her notorious place of abode, if she resided in the county; and if a minor, then her legal guardian should have been made a party, or some other discreet person appointed by the Court to defend for her.

3d. That a guardian could not be legally appointed, until the minor was served with *scire facias*, and if John W. Taff was appointed guardian, *ad litem*, before such service, the Court had no jurisdiction.

4th. To constitute a good *scire facias*, under the Act of 1830, it should be issued against the tenant in possession of the land alleged to be fraudulently drawn, or against the drawer, and it must be served upon the person named as defendant; and this service must be executed before a guardian, *ad litem*, can be appointed, where the defendant is a minor.

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Each and all of which charges the Court refused to give, and counsel for plaintiffs excepted.

The jury found for the defendants, and counsel for plaintiff tendered his bill of exceptions, assigning as error the decisions, orders, rulings, and refusals to charge, above excepted to.

AKIN, for plaintiff in error.

MILNER; SHROPSHIRE; and UNDERWOOD, *contra*.

By the Court.—McDONALD J. delivering the opinion.

[1.] The first error assigned in the record, is on the decision of the Court directing an order of the Court passed at March Term, 1834, appointing John W. Taff guardian, *pendente lite*, of Harriett Taff, an infant, in an information filed by James Kirkpatrick, to set aside a grant for a tract of land to Harriett Taff, alleged to have been fraudulently drawn by her, as an orphan. The Court below was satisfied with the evidence before it, that the order was passed by the Court at the time specified, and he only directed that to be done, which ought to have been done at the time it was passed. We see no error in this order or judgment of the Court.

[2.] After the plaintiffs had closed their case, and the defendants had submitted their testimony to the jury, the plaintiff offered to prove certain matters in rebuttal of the defendants' evidence, which are set forth in the statement of the facts of the case. The first fact proposed to be proved was, that the guardian, John W. Taff, was never served with the *scire facias* sued out to annul the grant, and had no notice of it. That he never accepted the appointment of guardian, *ad litem*; that he was not at Court when it was made; had no notice of it; was never at Cass Court, and never appeared by attorney or otherwise to defend the *sci fa.*, and that the same proceeded by default. That the service on the *scire facias* was a forgery; that the guardian, *ad litem*, was appointed

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at the instance of the informer, James Kirkpatrick, and that he induced the Court to make the appointment of a stranger who was not present, by stating that John W. Taff was the legal guardian of Harriett Taff, and that his statement was false, and that Harriett Taff was born in Houston county, in this State, and was never out of the State until her marriage in 1845. The Court refused to admit evidence to any of the said points, and the plaintiffs excepted. If all the facts proposed to be proven are true, the judgment rendered against the defendant in that proceeding, was unquestionably a nullity. The proceeding to set aside the grant was against an infant, and an orphan, and by the law the return made on her behalf, could not be declared fraudulent until her legal guardian had been made a party to the *scire facias*, or other discreet person appointed by the Court in which the case was tried, to defend the cause for her. The *scire facias* was issued on the 14th day of March, 1834, and was returnable to the September Term of the Court thereafter. It issued against Harriett Taff alone. It does not purport to have been served upon her, but a return of service on John W. Taff, described as her guardian, is made on the *scire facias*. John W. Taff was appointed guardian, *ad litem*, at the instance of the informer, and before the return Term of the case. He does not appear to defend the case. There is no appearance. These circumstances alone excite very strong suspicions of the fairness of the proceedings, and are almost sufficient to warrant us in saying that the judgment was null. We do not say so, however. But we say that the tendered evidence to prove that the service of the *scire facias* given in evidence was a forgery, that the guardian, *ad litem*, never accepted the trust, and that the guardian, *ad litem*, was appointed at the instance of the informer, ought to have been admitted. It was urged that the defendants are *bona fide* purchasers without notice. But if the judgment by which the title is claimed to have

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passed from the drawer is a nullity, what becomes of the title? There were defects enough patent on the face of the proceedings, to awaken the suspicions of a prudent man. But the consideration to which a *bona fide* purchaser is entitled, is not in this case. No title can be derived under a null judgment. It is not the case of a good judgment which is subsequently set aside or reversed. But it is the case of a void judgment without a proceeding to annul it, if the proof offered can be made. That the informer suggested to the Court the name of a person to be appointed guardian *ad litem*, would not have been objectionable perhaps, if the infant herself had been served, and notified to suggest a proper person, and she had failed or refused. But that is not the case. The informer moved the appointment before there was a service, and his appointee was served when he was not a party.

[3.] We think there is no error in the refusal of the Court, to rule out and withdraw from the jury the record of the *scire facias*, and the proceedings thereon. We will not consider whether, in strict law, either party was entitled to an appeal, as a matter of right, in such proceeding; because the Courts who were entrusted with the execution of the laws in those days, uniformly allowed appeals; and to hold to the contrary now, would unsettle titles to property to a vast amount, which originated and matured under the authoritative judicial construction of the parties' rights.

[4.] There was a service entered on the writ of *scire facias*, which was sufficient to authorize the submission of the evidence to the jury, and it was in fact admitted without objection.

The plaintiffs submitted in writing many requests to the Court to charge the jury. That in regard to the right of appeal we have already disposed of. The remaining requests are upon matters which might be remedied by proof, and do not necessarily avoid the proceedings. The judgment of

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the Court below must be reversed, however, on the ground which we have stated.

Judgment reversed.

FRANCIS IRWIN, plaintiff in error, vs. **WHITMEL L. STERLING** and **BETHENA STERLING**, executors, *de son tort*, defendants in error.

A suit pending against a defendant cannot, on his death, be continued against an executor, *de son tort*.

Scire facias to make parties, from Troup Superior Court. Decision by Judge BULL, at November Term, 1858.

Francis Irwin, the plaintiff in error, instituted an action of assumpsit against William H. Sterling, on two promissory notes. Sterling appeared and pleaded the general issue, but died before the trial Term.

This was a *scire facias*, sued out by plaintiff against Whitmel L. Sterling and Bethena Sterling, to make them parties defendants in said action, as executors, *de son tort*.

The Court dismissed the *scire facias*, holding that an executor, *de son tort*, could not be made a party by *scire facias*, to a suit pending against deceased at the time of his death.

To this decision counsel for plaintiff excepts.

B. H. HILL, for plaintiff in error.

B. C. FERRELL, *contra*.

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By the Court.—McDONALD J. delivering the opinion.

It is under the Judiciary Act, that suits are authorized to proceed against the representatives of a deceased party, and the statute has reference to rightful executors or administrators, and does not embrace executors, *de son tort*. By statute, executors or administrators are exempt from suit for twelve months from the *probate of the will* of the testator. In regard to cases pending, “when the defendant shall die, it shall and may be lawful for the plaintiff to issue a *scire facias*,” “immediately after the expiration of twelve months, requiring the executor or administrator to appear and answer to the cause.” Twelve months are allowed to a rightful executor to marshal the entire assets of his testator’s estate. This is for the benefit of the estate. No such privilege is granted to an executor, *de son tort*; for his interference with the assets is a wrong for which he is immediately liable in an original suit, to the extent of his intermeddling. It is by the statute alone that a suit pending against a defendant at the time of his death, can be continued against his personal representative, and the Act contemplating its continuance against rightful executors or administrators only, an executor, *de son tort*, cannot be made a party

Judgment affirmed.

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SOLOMON STALLINGS, plaintiff in error, vs. RILEY J. JOHNSON, defendant in error.

About the time a note fell due, the holder went to the maker, and, after conversing with him about the note, entered into an agreement with him, by which, in consideration of a promise, of 8 per cent. of usury, he was to wait

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with him twelve months on the note. The maker was then able to pay the note, and would have paid it, if pressed for its payment. Afterwards, he dealt in cotton, and broke. The endorser knew nothing of this agreement. *Held,* That he was discharged.

Complaint, in Floyd Superior Court. Tried before Judge HAMMOND, February Term, 1859.

This was action by Solomon Stallings, endorsee, against A. T. Harden maker, and Riley J. Johnson endorser, of a promissory note for \$1,000, dated 3d June, 1854, and payable 25th December, 1855. The note was signed by Harden, as maker, and endorsed by Johnson, who was the payee.

It appeared that about the time the note fell due, Stallings, then the holder and endorsee, agreed with Harden, the maker, that if he would pay him 8 per cent. over and above the legal interest, that he would not bring suit on said note for twelve months; and Harden gave his note to Stallings for the sum of \$80 00, for, and on account of said usurious interest. Johnson, the endorser, had no knowledge of this arrangement. That at this time Harden was solvent and would have paid the note, if Stallings had not agreed to wait; and that he has since become insolvent; that the \$80 note for usury or indulgence was still unpaid. This is the substance of the testimony of Harden, who was introduced and sworn in the case. It further appeared that plaintiff resided in North Carolina at the time the indulgence was given; that he left the State of Georgia immediately after the contract, and did not return until the end of the year, and had no agent in this State. That the failure of Harden was produced by losses on cotton, purchased by him in May after the indulgence was extended to him. Stallings' son-in-law living in Floyd county, Ga., sometimes acted as his agent.

Plaintiff's counsel requested the Court to charge the jury, that unless Johnson notified Stallings to sue, he could not avail himself of the agreement between Harden and Stallings to defeat a recovery in this case. That if they believed the

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agreement was wholly usurious, Johnson was not released as endorser; that this defence was not available unless the contract between Stallings and Harden was a valid one. That an agreement not to sue for a limited time, does not discharge the endorser, as such agreement is not binding, and suit may nevertheless be commenced at any time, and if Stallings might have brought suit at any time, and did not, it was simply forbearance to sue, and did not discharge the defendant, as endorser. Which charge the Court refused to give, but charged "that if Stallings entered into an agreement to wait with Harden twelve months and did wait, and Harden in the meantime became insolvent, and by reason of the delay, the endorser was injured, then he was released, and they should find for defendant."

To which charge and refusal to charge plaintiff excepted. The jury found for the plaintiff against Harden, but in favor of Johnson, the endorser, and plaintiff assigns as error, the charge and refusal to charge above, excepted to.

F. C. SHOFSHIRE, for plaintiff in error.

D. R. MITCHELL ; and W. AKIN, *contra*.

By the Court.—BENNING J. delivering the opinion.

The questions in this case may all be reduced to this one, was the charge right? The charge was as follows: "that if Stallings entered into an agreement, to wait with Harden twelve months, and did wait, and Harden, in the meantime, became insolvent, and by reason of the delay, the endorser, was injured, then he was released."

This charge, of course had reference to the agreement shown by the evidence. The agreement shown by the evidence was, in substance as follows; Stallings, the holder of the note, promised Harden, to wait with him twelve months for the money due on the note; and Harden promised Stal-

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lings, to pay him that money, at the end of twelve months, and also to pay him eighty dollars of usury. In this agreement, the promise on the one side, was the consideration for the promise on the other. Did this agreement, discharge Johnson, the endorser. If it did, it is clear, that the charge was right.

If the agreement was a *binding* one, it did discharge Johnson. This all admit.

Was it a binding one?

The agreement being one in which, the promise on the one side, was the consideration for the promise on the other, was binding if there was, in the promise on the one side, any thing of value to the party on the other side. If the consideration for a contract, is of any value at all, the consideration is sufficient, to support the contract. This is, certainly, true, as a general principle.

Stallings's promise to Harden, was, to give him twelve months within which, to pay the note. Such indulgence was, certainly, a thing of value to Harden. There was, then, in Stallings's promise to Harden, something of value to Harden. Therefore, that promise was a sufficient consideration to Harden, for his promise to Stallings.

Harden's promise to Stallings, was, to do two things at the end of twelve months; one to pay Stallings the note; the other, to pay him \$80, over and above the note.

Was there any thing of value to Stallings, on the part of this promise, by which, Harden engaged to pay him the note at the end of twelve months? In other words, is the promise of the endorser of a note, to the holder, to pay him the note, a thing of any value to him? Does it add anything, to the promise already existing in the note itself? There certainly are cases in which, such a promise is of value, and of great value to the holder of the note. One of these is the case in which, the endorser has been discharged for want of notice of the dishonor of the note. In that case, such a promise of the endorser, if made with a knowledge of his discharge,

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revives his liability. (*Byles on Bills*, 223, 224.) Another, is the case in which, the endorser has been discharged, by time given to the maker. In that case, also, such a promise of the endorser, if made with a knowledge of his discharge, will revive his liability. *Byles on Bills*, 187. Suppose, then, that Stallings had given Harden indulgence, by some contract, unquestionably, binding, and, that, thereby, Johnson, the endorser, had become completely discharged, and yet that Johnson had, afterwards, with a knowledge of his discharge, promised Stallings, to pay the note. This promise would have restored his liability as endorser. Suppose further, in this case, that Stallings, in consideration of this promise by Johnson, had, on his part, promised Johnson something; as, to give him time on the note, would not that be a promise founded on a valuable consideration? Surely it would. These two, then, are cases in which, such a promise would be of great value. Another case is that in which, the statute of limitations is running against the contract. In that case the promise takes the contract out of the statute, and relieves it from all impression which, the statute may have made upon it. And, if the promise be, to pay at a future day, the statute will not recommence running, until that day comes.

To this last class of cases, belong the case in hand. For in it, the promise by Harden, was made at or about the time when the note fell due, and was a promise to pay the note, at the end of twelve months, from the promise. Such a promise relieved the note, for a considerable time, from the operation of the statute of limitations. That was a thing of some value, to Stallings.

In the utmost strictness, then, the promise was of some value to Stallings, and that being so, the promise was, according to the general principle aforesaid, a sufficient consideration to support the counter promise of Stallings. If so, then the contract to give time, was a binding contract, unless there is something in the case, to take it out of that general principle.

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So much for the argument from the general principle, that if the consideration is of any value, it is sufficient to support the contract; the result is, the same, I think, if we argue from decided cases.

In "*Samuell vs. Howarth*, (3 Mer. 272,") "A. guaranteed the payment of any goods, to be supplied by B. to C.," "C., having accepted bills for the amount of the goods delivered, B. permitted him, to renew them when payable, without any communication to A. on the subject of such renewal." "It was held, by Lord Eldon," "that A. was discharged from his guaranty, by virtue of the rule, that a creditor giving further time to the principal debtor, without the consent of the surety, releases the surety." 2 *White & Tudor's, Eq. Cas.*, 358. This is, saying, that if the creditor takes a new bill from the principal debtor, the act binds him, and, he discharges the surety. But what is a new bill? It is *pro hac vice*, only a promise in writing, to pay the old debt at a new day; and, there can be no more consideration to the creditor, to induce him to take such a promise in writing than there is to induce him to take such a promise not in writing. Therefore, if it be true, that there is a sufficient consideration to him for taking the promise in writing, it must be equally true, that there, is a sufficient consideration to him for taking the promise not in writing.

Gould vs. Robson, (8 *East*, 575.) was stronger. There, not even the old bill was given up. See, also, the cases referred to by the Court, in *English vs. Darly*, 2 *Bos. & Pul.* 61.

So much for what, decided cases teach.

Thus then, it seems, that whether we go by these decided cases, or, by the general principle, that the consideration, if of any value at all, is sufficient to support the contract, we must conclude, that this agreement for indulgence to Harden was binding.

What is there to interfere with a conclusion thus, drawn from both principle and authority? Is there any decision,

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expressly and consciously, saying, that such a promise as this of Harden's, is a thing of no value, and therefore, that it is a thing, which does not suffice to be the consideration of a counter promise? I know of none. We may I know, frequently, find, dicta, and less frequently, decisions, to the effect, that a contract for time, between the holder and the principal, must, to discharge the surety, be on a sufficient consideration. But I can find no case in which, it was decided, that a promise by the debtor, to pay at a future day, was of no value to the creditor, and *therefore*, that it was a thing not sufficient to support a promise of indulgence made by the creditor. There may be cases in which it was silently *assumed*, apparently without thought or examination, that such a promise by the debtor, was not sufficient, as a consideration, for a promise by the creditor, to give time, but if there are, they cannot have a great deal of weight as authority.

The argument against the conclusion, aforesaid was confined, exclusively, to the effect which the other branch of the promise, had on the agreement; viz, the branch of the promise by which, Harden agreed to pay Stallings \$80 over and above the amount of the note, for the indulgence. That argument assumed, that Harden's engagement to pay this sum, was the sole consideration to Stallings, for his promise of indulgence, and, having assumed this, the argument insisted, that as the engagement to pay this sum was usurious; it was void and the promise of indulgence founded on it, had also to be void. This was the sole argument. There were read, in support of it, some American cases; (2 *White & Tudor, Eq. Cas.* 381,) but in all of those cases that are analogous to the present, it will be found, I think, that they make this same assumption; viz, that the debtor's engagement to pay usury, is the *sole* consideration to the creditor, for his promise of indulgence. The argument then, and the decisions, are, it is manifest, not a full answer to the question involved, which is, whether a creditor's promise to indulge, founded on the debtor's promise

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to do *two* things, at a future day; one, to pay the debt; the other, to pay usury on the debt, is binding? This argument and these decisions, leave out of view, one of the elements in the question; viz. the promise to pay the *debt*. Hence, they are, in strictness, to be considered as not meeting the question.

The only English case at all like the present, which was cited, was that of *Philpot vs. Breant*, (4 *Bins* 717.) There, the promise on which, the engagement to indulge, was founded, was a promise made by the person who was executrix of the acceptor, and was a promise to pay the debt, "out of her private income." Such a promise was, every way, valueless to the creditor. It was a promise made her, not as executrix, but in her private capacity. Hence it could be of no value, by way of reviving the debt, or taking it out of the statute of limitations. It was a promise to pay a debt of the estate, out of her private income. And such a promise is worthless, by being within the statute of frauds. Besides, the question, whether the promise might not be good, to take the debt out of the operation of the statute of limitations, was not made.

But although it may be true, that the engagement of Harden to pay usury to Stallings, was not the entire consideration for the latter's promise of indulgence, may it not be also true, that the effect of that engagement, was such, as to destroy the value of the other part of the consideration, the part consisting of Harden's engagement to pay the old note?

Is it not true, that if, even a part of the consideration of a contract, be illegal, the contract is void?

We find it frequently said, by Judges and law writers, that if a part of the consideration of a contract, be *illegal* the contract is void; and the reason given, is, that every part of a consideration, is to be presumed, to have had some effect, in inducing the party recipient of the consideration, to enter into the contract. (1 *Smith's Lead. Cases*, 284, 285.) Now this reason applied, equally, to cases in which a part of the

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consideration *fails* for any other cause, than illegality; and yet, we find, that it is not sufficient to induce Courts to hold the contract, void, in those cases. The most that a partial failure of consideration in the cases, can do, is, to put it in the power of the party to be benefitted by the consideration, to repudiate the contract or not, *as he pleases*. And this, I strongly incline to think, is as much as a partial failure of the consideration ought to do, in cases in which, that failure is owing to illegality in a part of the consideration. If the party to be benefited by the consideration, is willing to abide by the contract, although a part of the consideration fails for illegality or any other cause, it is evidence, that this part was no inducement to him, to enter into the contract—that the good part was the sole inducement to him to enter into the contract; and the case becomes the same that it would have been, if the illegal part of the consideration had never been put into the contract. If this party, to the contract, then, is willing to abide by it why should we not uphold the contract? I can see no reason why we should not. Certainly upholding the contract will not be anything of which, the other party can complain.

I incline, to think, then, that the rule is general that where there is a partial failure of the consideration, the contract is nevertheless valid, if the party to receive the consideration, is still willing to hold on to the contract; and that the case in which, the partial failure, of the consideration is owing to illegality in a part of the consideration, is no exception to the rule.

On this subject, there, is, as it seems to me, much conflict, apparent or real in the English cases. Some of them, seem to say, that, if there is illegality in a part of the consideration, the contract is void; others of them seem to say the opposite. Of the former class are *Featherstone vs. Hutchinson*, (*Cro. Eliz.* 199.) and the cases which follow it. Although, really, the part of the consideration that was illegal in that case, might be taken as the *whole* consideration, the

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other part being merely *nominal*—the payment of two shillings. Of the latter class, are *Colston and Carre*, *Crurps and Golding*, (1 *Vin. Abr.*, 332;) *Gaskill vs. King*, (11 *East.* 168;) *Wegg vs. Shuttleworth*, (13 *East*, 87;) *How vs. Syrge*, (15 *East*, 440,) and other cases. And some general principle, like that aforesaid, is needed, to show us which of these cases, to reject, if, indeed, we cannot, by that principle, reconcile all of them so that we shall be relieved from having to reject any.

Assuming it as true, that the rule aforesaid is a general one, extending to the case of a partial failure of consideration for illegality, the question is, whether Stallings has elected to repudiate the contract on the ground, that a part of the consideration on which he acted, was illegal? And we do not find that he has. He still holds on to the note given for the \$80, of usury. He has made no offer to return it—given no notice to Harden, or to any one, that he considers the contract at an end. On the contrary, the evidence is, that Harden still expects to pay that note. He says he will pay it if he ever gets able to do so. And doubtless Stallings is cherishing the hope and expectation that it will be paid, at some day.

We are not prepared to say, then, that the illegality of a part of the consideration is, of itself, sufficient in any case, to render the contract void. But if so sufficient in some cases, it cannot be, that this is one of the cases; because, we have a statute which make contracts involving usury, void, only for the usury, but good for the rest—good for the principal. *Cobb*, 393. By this statute, then, so much only of the contract for indulgence, as involved usury, was void; the rest was good.

Then the usurious part of the consideration, did not vitiate the other part of it, and that part was of itself, of some value as we have seen. It would follows then, that, if a consideration was all that was needed, to make the promise of indulgence binding, a consideration existed.

But was a consideration needed? The later cases say so;

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the earlier do not; and these were nearer to the time of our adoption of the law of England. In *Anderson vs. George*, (1757,) there was no consideration for the indulgence given, and Lord Mansfield said, "here is an actual credit given for eight days, and the loss must fall on the plaintiff." (*Note g. to Chitty on Bills*, 441.) In *Tindal vs. Brown*, (1 T. R. 167.) Buller J. said; "as to giving time, the holder does it at his peril; and that circumstance alone, would be sufficient to decide this case. For in no case has it been determined, that the endorser is liable after the holder of the note has given time to the maker."

We are not prepared to say, whether there may not be cases in which consideration will be necessary, according to the teaching of the later decisions; but we do think, that there may be cases in which, the want of a consideration will not prevent the agreement from so operating as to discharge the surety. For example, suppose when the note falls due, the holder goes to the maker, who has the money with which to pay it, and, instead of requiring him to pay it, agrees with him, on the promise of usury, to postpone the day of payment; and, that afterwards, the maker gambles in cotton and loses this money and all else of his property, would not this agreement, even admitting it to be one destitute of a sufficient consideration, be a thing to discharge the endorser? We think it would. And why? Because, such an agreement by the holder, would be a violation of his duty to the endorser, and would operate to the endorser's prejudice, to the full amount of the note. What is the holder's duty? By the old law, (the common law,) his duty is, to demand payment of the note, from the maker, at its maturity; and, in case of his failure to pay it, to give notice of the failure, to the endorser. Much more, must it be his duty, to abstain, at the maturity of the note, from any positive bargain with the maker then able to pay it, not to require its payment but to wait with him, to a future day for its payment. So much of this old law, as requires the holder to make demand of payment,

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and, to give notice of nonpayment, was repealed by the Act of 1826, (*Pr. 462.*) But no more of it, than this, was repealed. Therefore, the part which requires the holder to abstain from making a positive bargain, at the maturity of the note, not to require payment of it, still remains in force. Consequently, it is still the duty of the holder not to make any such bargain. The matter may be stated another way. The undertaking of the endorser, is, to pay the note when due, provided, the maker does not pay it, and, provided, the holder does nothing to relieve the maker from his duty so to pay it. This, and, no more than this, is the undertaking, ever since the Act of 1826. This being the endorser's undertaking, it follows, that there is *no breach* of his undertaking, in the case in which, the holder does any thing at the maturity of the note, to relieve the maker from his duty to pay it.

It is manifest, that such a bargain for time, would be to the prejudice of the endorser, if he were still held bound, and to the full extent of the debt—for, but for the bargain, the note would have been paid, by the maker, and that would have prevented the endorser from having to pay it.

This then is a case in which, we think, that the bargain for time, would discharge the endorser, even although, it might be true, that the consideration for the bargain, would not be sufficient.

And the case in hand, seems to be this very case. For according to the evidence, Stallings the holder, went to Johnson, the maker, "about the time," at which the note fell due, "and after conversing about the note," "entered into an agreement," with Harden, that, if he, Harden would "pay him, Stallings, 8 per cent. over and above the lawful interest he, (Stallings,) would not bring suit on said note, until the expiration of twelve months." Harden was solvent, "and would have paid the note," "when it fell due, if he had been pressed for payment." "Most of the cotton the losses on which, caused the failure of Harden, "was purchased" "after the contract for time," had been made. Such, the evi-

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dence shows to have been, the present case. We therefore, think that the agreement discharged the endorser, even if the agreement is to be taken as one founded on a consideration which was insufficient.

Upon the whole then, we think, that the charge of the Court was right, which was as before stated, "that if Stallings entered into an agreement to wait with Harden, twelve months, and did wait, and Harden, in the mean time, became insolvent, and by reason of the delay, the endorser was injured, then, he was released." This charge, the evidence considered, we think was right.

Judgment affirmed.

**27 576
0117 918** WILLIAM GARRETT, trustee, plaintiff in error, vs. LAWRENCE
Brock, defendant in error.

Negroes were conveyed to a trustee, his heirs, executors, and administrators, forever; in trust; first, for husband and wife, for their joint lives; secondly, for the survivor, for his or her life; thirdly, for the children; with a power to the husband, at his death, to distribute the property among the children, and to end the trust, and in case of his failure to do this, with a direction to the children to divide it among themselves; and, with a final declaration, that the trust should cease, when the youngest child arrived at lawful age, provided the husband should be then dead. The husband was not then dead. He died afterwards; and after his death, the wife died. Before her death the trustee commenced an action of trover for some of the negroes. It did not appear that she had a legal representative.

Held, That the trustee was entitled to recover, at least what was her interest in the negroes.

Trover for negroes, in Floyd Superior Court. Tried before Judge HAMMOND, August Term, 1858.

Garrett, trustee, vs. Brock.

This was an action of trover, brought by William Garrett, as trustee of Mrs. Ariana Washington, against Lawrence Brock, for certain slaves.

At the trial, plaintiff offered in evidence, in support of his title, the following trust deed :

Exhibit A.

This indenture, made this first day of December, in the year of our Lord, eighteen hundred and sixteen, between Warner Washington and Ariana Washington, his wife, of the State of Virginia, and King George county, of the one part, and Needham L. Washington of the same place, of the other part, witnesseth, that he the said Warner, for and in consideration of the sum of six shillings current money of the State aforesaid, to him in hand paid, before the ensealing and delivery of these presents, the receipt whereof is here acknowledged, and also for and in consideration of the covenants hereinafter contained, and on the part of the said Needham, to be done and performed, hath granted, bargained and delivered, and by these presents, doth grant, bargain, sell and deliver unto the said Needham L. Washington, the following slaves, viz: Peyton, Beverly, Phil, John, Sylvia, Bob, Nicholas, Sally, Nelly, Matilda, Nelson, Letty, and with the future increase of the said Sylvia, Sally, Nelly, Matilda, Letty and Emily; also, his stock of horses, cattle, sheep, and hogs; also all his household and kitchen furniture, plantation utensils, &c. of every kind whatever; also, all the fund and amount of money that shall or may accrue from his, the said Warner's sale of land, and improvements, lying in King George county, lately made to Giles Fitzhugh, of Westmoreland county; provided always, and in every case, that all his the said Warner's just debts, which now are, and at this time due and payable to his several creditors, and all his the said Warner's debts, that may have been heretofore contracted for at any time prior to this date, which may now be due

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and payable, and that may hereafter become due by any bargain, agreement, covenant, contract or arrangement, whatsoever heretofore made and entered into by him the said Warner, shall be first paid off, and duly satisfied out of the aforesaid fund or amount of money, &c., arising from the aforesaid sale of land, and the remainder of the aforesaid fund and amount of money to be vested in other lands and improvements, or such other property as shall hereafter seem most desirable and suitable to him, the said Warner, or in case of his death, that shall seem most desirable and suitable to him, the said Needham L. Washington, for the benefit and accommodation of his, the Warner's family; and the said Warner and Ariana, for and in consideration of the premises hereinbefore mentioned and expressed, do also jointly convey and make over all the right and title of them, the said Warner and Ariana, of, in and to all the property or properties, estate or estates whatsoever, which they, the said Warner and Ariana now are, or may hereafter be entitled, either by inheritance in right of her, the said Ariana, or otherwise, to have and to hold the aforesaid negroes and other property herein conveyed by the said Warner, as well as all the right and title of, in and to, all other property, properties, estate or estates, which they, the said Warner and Ariana, now are, or hereafter may be entitled to, either by inheritance in right of her, the said Ariana, or otherwise; and also herein jointly conveyed by the said Warner and Ariana, unto the said Needham L. Washington, his heirs, executors and administrators, forever, upon trust nevertheless, and on the following conditions, viz. That he, the said Needham, his heirs, executors and administrators, shall and will stand possessed of the said property, granted, bargained and sold, as well as of the land and improvements, or such other property before mentioned, as when actually purchased, or may be intended to be purchased hereafter, by the said Warner, or in case of his death, by his trustee, to the uses and purposes hereinafter expressed, and no other. First: To the use of the said Warner and the said

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Ariana, his wife, during their joint lives, to pay over to them the profits thereof. Secondly: To the use of the longest liver for his or her life. Thirdly: To the use of Francis Whiting Washington, John Stith Washington, and Harriet Ann Washington, children of the said Warner and Ariana, and every child or children that the said Warner and Ariana may hereafter have of their bodies, in either case, to pay over to them the profits of the aforesaid estate. Fourthly: The said Warner shall have the right and the power at his death, to appoint and direct by will, deed, or otherwise, in what manner the aforesaid property and estates, as well as the right to the unreceived part of the expectation, by his wife Ariana at the death of her mother, provided it be not gotten before the said Warner's death, and every other right and inheritance whatever, to which the said Warner and the said Ariana, or either of them, may now or hereafter be entitled, shall be disposed of, and distributed amongst his aforesaid several children, by his said wife Ariana, and no others; and also at the same time to order and direct when this trust shall finally cease and expire. And lastly: In case the said Warner shall fail or neglect, from any cause whatever, to appoint or direct as aforesaid, by will, deed, or otherwise, in what manner the aforesaid property and estate, as well as the unreceived part of the expectation by his wife Ariana, at her mother's death aforesaid, together with any other right or rights, title or titles, to which he the said Warner, and the said Ariana, or either of them may be entitled, either by inheritance or otherwise, shall be disposed of and distributed amongst his aforesaid several children, that in that event it be understood hereby, that his, the aforesaid several children, shall divide the same as they will be thereto entitled by virtue of the statutes for distribution of estates of intestates, and that this trust shall finally cease and expire, when the youngest of the aforesaid children arrive at lawful age: Provided, he, the said Warner, shall die before that time, and the said Needham, for himself, his heirs, executors, and ad-

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ministrators, doth covenant with the said Warner and Ariana, their heirs, executors and administrators, that he, the said Needham, his heirs, executors and administrators, shall and will stand possessed of the aforesaid property, right, &c., to the uses and purposes aforesaid, and no other, and that he will well and truly, so far as he may be able, execute the trust, as before expressed, pursuant to the intention and meaning of this indenture, and the said Warner and Ariana, for themselves, their heirs, executors, and administrators, warrant and defend the aforesaid property and right to the said Needham, his heirs, executors, administrators, against the claim or claims of them, the said Warner and Ariana, their executors and administrators, and every other person whatsoever, forever.

In testimony whereof, the parties to these presents, have hereunto interchangeably affixed their hand and seals, this day and year first above written.

WARNER WASHINGTON, (L. S.)
ARIANA WASHINGTON, (L. S.)
NEEDHAM L. WASHINGTON, (L. S.)

Signed, sealed, delivered and acknowledged in the presence
of

JOHN H. MICON,
GILES FITZHUGH.

After the introduction and reading of this deed, defendant's counsel, plaintiff agreeing that the motion should then be made, moved to dismiss the action, on the ground, that the trust had ceased and determined according to the terms and provisions of said deed, and that no right of action existed or remained in plaintiff.

It was admitted by the plaintiff, that Warner Washington died in July, 1849; that Ariana Washington died in 1857, since the commencement of this suit; and that all the children of said Warner and Ariana, for whose use the property in the trust deed was held, under the third provision or

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trust thereof, were of age before the death of the said Warner Washington. And that William Garrett was substituted as trustee in the place of Needham L. Washington, by a Court of Equity of competent jurisdiction, before the commencement of this suit.

After argument, the Court sustained the motion and dismissed the action, and counsel for plaintiff excepts.

UNDERWOOD; and PRINTUP, for plaintiff in error.

AKIN; and SHROPSHIRE, *contra*.

By the Court.—BENNING J. delivering the opinion.

Was the Court below right in sustaining the motion to dismiss the action?

The ground on which the motion was put and decided, was, "that the trust had ceased and determined, according to the provisions of" "the deed of trust."

Was this ground true?

The first argument employed to show it true, was, that the trust expired at the death of Warner Washington, which happened before the commencement of the suit. But the first use in the deed is to Warner, and his wife Ariana, "for their joint lives;" and the second, is to "the longest liver for his or her life;" and she was the longest liver. Consequently, the use or trust, must, by the terms of the deed, have continued beyond his life. The first argument, therefore, is not sufficient.

The second argument was, that "if the trust did not terminate at the death of Warner Washington, it expired at the death of Mrs. Washington, all the children being" then "of age," "the property absolutely vested in them, and they have the right to sue for the same."

But Mrs. Washington did not die until 1857, and the suit was commenced in 1849. Consequently, granting this argu-

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ment to be good, it does not prove that the action was not well commenced, and well prosecuted for eight years. Indeed, it admits the contrary. If then, that be so, did the action abate by her death? Yes, says this argument; it says that the property, at her death, vested absolutely in the children. What property? The whole property, including what had been her interest in it, before her death. Is it true, that by her death, both the equitable title to *this* interest—a title that was in her—and the legal title to it—a title that was in the trustee, passed into the children? To justify us in saying, that even the equitable title to that interest, passed into the children, we should have to assume some things which, the evidence does not authorize us to assume. We should have to assume that she died out of debt, and without a will; for, if she died in debt, her creditors would have the first claim upon her estate; and if she had a will, her legatees would take what the creditors left.

We are not authorized then, we think, to say that even the equitable title to *her* interest in the property, vested at her death, in the children.

Did not that title vest in her legal representative. It is sufficient to say, that, for aught that appears, she had no legal representative. It does not appear, that she had a legal representative.

And even if it were, that she had a legal representative, and consequently that the equitable title to this interest, was in him, we should nevertheless be inclined to think, that the legal title to it, would still remain in the trustee—that, in other words, the trust would not be executed in such legal representative—but that a conveyance or transfer of that title, by the trustee to him, would still be necessary, in order to clothe him with the entire title. The reasons for this inclination will be indicated in the close of this opinion.

This argument then, is we think, insufficient.

The third argument was this; “When the youngest child arrived at full age, Warner Washington being dead, the chil-

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dren were to divide the property between themselves, and the power and duties of the trustee ceased at the death of Washington, he having nothing further to do."

But it turned out, that Warner Washington was not dead, when the youngest child arrived at full age. The part of the deed relating to that division, therefore, failed. The division was to take place, at that time; "provided he, the said Warner Washington" should "die before that time." He died after that time.

The fourth argument was in these words:

"The property being in the children, Garrett cannot recover it for he is no longer their trustee. Mrs. Washington being dead, he is no longer her trustee, and if there is any thing due her individually—damages for hire—it goes to her representative, and the trustee cannot demand it, for if he recovers any thing, it can only be as trustee, for a dead person."

A part at least of the property, is, as we have seen, *not* in the children—the part that Mrs. Washington was entitled to.

We are not prepared to admit, that the mere death of the *cestui que trust*, destroys the trust, and divests the trustee of the legal title. We think, that, whether such death destroys the trust or not, must depend entirely upon the terms and conditions of the trust. And among the terms and conditions of this trust, there is none that says the trust is to expire, at her death. And if there were, that could not have the effect, to divest the trustee of the legal title to the interest in the property which belonged to her, but he would still hold the legal title to that interest, in trust for whoever might become her administrator or executor. So that, even if we concede, that the trust expired with her, it will still be true, that the trustee will have the right to sue for the interest which she had in the property, there being as yet, no legal representative of her.

The conclusion, then, to which we come, is that none of the arguments are sufficient to establish the position, that the

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trust had "ceased and determined," in *every* part of the trust property. No other argument occurs to us, which would, in our opinion, be sufficient to establish that position.

The result therefore, is that we think, that the trustee was entitled to sue for and recover, at least, the interest, of Mrs. Washington, in the property. Hence, we think, that the Court erred in dismissing the action.

Was he not entitled to recover the entire interest,—all of the negroes, and all of their hire? I resume this question, to indicate as I promised to do, the mere inclination of our opinion on it.

Was not the trust, on the death of Mrs. Washington, executed in the children, so far as their interest in the property was concerned? Or was it still a subsisting trust, and the case one in which, it was necessary, that there should be a transfer of the legal title by the trustee, to them, in order to put that title in them?

It must be remembered, that the terms of the conveyance to the trustee, are sufficient to carry into him, the whole legal interest. They are, to him, "his heirs, executors, and administrators, forever." It must be remembered, too, that the conveyance is by deed, and not by will. And lastly, it must be remembered, that by the terms of the conveyance, the trust was to subsist, in certain events, (which I may say have happened,) for the children, after the death of both parents. Under these circumstances, did the trust terminate at the death of Mrs. Washington, and the legal title, by mere operation of law, pass from the trustee to the children, rendering it unnecessary, that there should be a conveyance of that title, made to them by him?

The question is not without difficulty; but we are inclined to think, that the authorities are in the negative. See *Hill on trustees, and the cases cited by him, beginning at 248, Marg. 1; Also, Id. 255, 324, 325; 2 Coke Litt., But. note 15.*

Lawrence, adm'r, vs. Philpot, guard'n.

In *Jordan vs. Thornton*, 7 Ga. 520, this Court seems to recognize the necessity of some *transfer*, by the trustee, though they held, that a bare delivery of the property, was sufficient. The property was personalty—negroes. The language of the Court was, “No conveyance of the legal estate by the trustee, was required by the will; it passed by operation of law upon delivery.”

We must, with our views, reverse the judgment and reinstate the case.

Judgment reversed.

BENNETT LAWRENCE, administrator, plaintiff in error, vs.
ALLEN PHILPOT, guardian, defendant in error.

- [1.] The only source, in general, from which an administrator with the will annexed, can derive the power to sell the slaves held by him, as administrator, is the will, or, an order of the Court of Ordinary.
[2.] An administrator and one C. referred a dispute between them as to some negroes, to arbitrators, who awarded the negroes to the administrator, and a sum of money to C., to be paid out of the negroes. The negroes were worth ten times the sum of money. The administrator proceeded to take steps to sell the negroes; the next of kin prayed an injunction to prevent the sale.

Held, That the injunction was properly granted.

In Equity, from Floyd county. Decision on motion to dissolve the injunction, by Judge HAMMOND, at chambers, 23d November, 1858.

This bill was filed by Allen Philpot, as the guardian of Sue Ledbetter, a minor child of John Ledbetter, deceased, against Bennett Lawrence, administrator, with the will annexed, of said deceased, to restrain and enjoin the sale of

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certain negroes belonging to the estate of said deceased, and for an account, &c.

The bill states, that John Ledbetter, late of the county of Floyd, died in August, 1856, leaving a will, in and by which he appointed Andrew M. Sloan his executor, and the guardian of his infant daughter, the said Sue, and of the child of which his wife was *enciente*; that he further willed and bequeathed to his wife two hundred dollars, together with all the household and kitchen furniture, and all the rest and residue of his estate, of which he might die possessed, or have *in expectancy*, he gave to his said child or children; that Sloan refused to qualify as executor, and defendant was appointed administrator, with the will annexed, and complainant, guardian of said infant; that shortly after the death of testator, his wife was delivered of a child, and soon thereafter, both mother and child died, leaving said Sue as sole legatee and owner of all the estate of testator; that said testator was possessed of a considerable estate real and personal, and had in expectancy seven negroes of the value of seven thousand dollars, all of which has come into the possession of said Lawrence, administrator with the will annexed, as aforesaid; that said administrator has sold all the property, owned by, and in the possession of deceased, at the time of his death, and that he has cash in hand more than sufficient to pay all the debts; that he is now proceeding to sell the same negroes which have come into his hands since testator's death, and has advertised the same for sale, and will sell them unless restrained by a Court of Equity, which sale will be contrary to the provisions of said will, and injurious to the rights and interests of complainant's ward, to whom said negroes belong.

The bill further states, that said negroes, after the termination of the life estate, at which time testator's right, and interest as remainderman vested in possession, and before

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said right could be asserted, came into the possession of one Lee Crittenden, who ran said negroes off, and refused to deliver up the same, until complainant took, or was about to take steps for their recovery, when said Crittenden delivered said negroes up to defendant. The bill prays that the defendant be enjoined from selling said negroes, that he deliver them to complainant, as guardian of said Sue Ledbetter, and that he account for the estate in his hands, and pay over to complainant the balance after the payment of the debts, &c.

The injunction issued agreeably to the prayer of the bill.

The answer admits the death of John Ledbetter, as alleged in complainant's bill, that he left a will, and defendant was appointed administrator, with the will annexed, as stated; and that complainant was appointed guardian but alleges that defendant is unfit for such trust; that he is addicted to drunkenness, has small means, and has given a very insufficient bond.

The defendant further admits that he is in possession of said slaves, and states that after the death of the tenant for life of said slaves, at which time the right of testator, accrued as remainderman, Crittenden, as the executor of the tenant for life, took possession of the negroes, and the contest in relation thereto, between defendant and Crittenden, was submitted to arbitrators, who awarded said negroes to defendant, as the administrator, with the will annexed, of John Ledbetter, deceased, with directions that the same be sold, and that the sum of——be paid from the proceeds of said sale, to said Crittenden; and that it is in pursuance of, and in compliance with said award, that defendant is proceeding to sell said negroes; denies that there is more money in his hands than is necessary to pay the debts of deceased; claims that he is acting legally, and for the benefit of said infant, whose interest would be promoted by the contemplated sale.

Upon the coming in of the answer, defendant moved to

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dissolve the injunction. The Court refused the motion, to which decision defendant excepted.

PRINTUP, for plaintiff in error.

UNDERWOOD; **CHISOLM**; and **WADDELL**, *contra*.

By the Court.—**BENNING J.** delivering the opinion.

Was the Court below right in refusing to dissolve the injunction?

The motion to dissolve the injunction, was put on two grounds; one, that there was no equity in the bill; the other, that if there was any equity in the bill, it was sworn off, by the answer.

Was there any equity in the bill? We think, that there was.

The right of an administrator, with the will annexed, to sell slaves, must, in general, be derived either, from the will, or, from an order of the Court of Ordinary.

The bill, in the present case, shows that this right could have been derived from neither of these sources; for it shows, that the will did not confer on the administrator any authority to sell; and it also shows, that there was no order of the Court of Ordinary authorizing him to sell.

In short, there is in the bill, that which, taken as true, requires us to say, that the administrator had no authority to sell the slaves. Consequently, it must be true, that there was equity in the bill.

Does the answer swear off the equity of the bill? We think not. It does not pretend to say, that the will gives the administrator, the power to sell the slaves; or, that there is, any order of the Court of Ordinary, that does. What it says, is, that there was a dispute between the administrator, and one Crittenden about the negroes, and that this was referred to arbitrators, who awarded the negroes, to the administrator, and, a sum of \$639 80, besides costs, to

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Crittenden, and directed a sale of the negroes, "to pay the award and the expenses thereof."

The answer insists, that a right to the administrator to sell, is derived from this direction of the arbitrators.

But in the first place, all this is new matter, and is not responsive to any thing in the bill; and in the second place, it is not sufficient, if it be taken as true. The negroes are it seems, worth \$7,000. The "expenses" to be paid out of them will perhaps amount to \$700. There can be no necessity, then, for selling all the negroes to pay those "expenses." It may, perhaps, turn out, that it will be necessary to sell some of the negroes, to pay those expenses. That will, probably, depend on the result of some litigation in which, the administrator is involved. As things stand, the administrator would act wisely, to consult the Court of Ordinary before he sells one of the negroes.

Judgment affirmed.

REBECCA E. STANLEY, claimant, plaintiff in error, vs. **WILLIAM B. S. GILMER**, plaintiff in *fi. fa.*, and **WILLIAM REID**, surety and transferee of execution, defendants in error.

A trustee purchasing property in his own name, and paying for it with his own effects, holds it as his own, and it is subject to the payment of his debts, unless before a judgment lien attaches, it is transferred, *bona fide*, to his *cestus que trust*.

Claim, from Troup county. Tried before Judge BULL, at November Term, 1858.

Stanley vs. Gilmer and Reid.

The facts of this case are as follows:

William B. S. Gilmer recovered judgment against William L. Stanley, principal, and William Reid, security, for one hundred and seventy-three dollars and twenty-four cents, besides interest, upon which execution issued, dated 26th June, 1855. This execution was paid off in full by Reid, the security, on the 19th November, 1855, and afterwards, on the 24th of the same month, by order of Reid, was levied on a negro girl name Martha, eleven or twelve years old, as the property of William L. Stanley. Mrs. Rebecca E. Stanley, the wife of said William L., interposed a claim to said negro.

This claim was put in by William L. Stanley, the husband, as trustee of his wife. William L. Stanley in the meantime died.

Upon the trial of the issue, it was admitted by claimant, that the negro girl was in possession of William L. Stanley, at the time of the levy, and at the time of his death. It was also admitted that Doctor Carter, from whom the girl was purchased by Stanley, received from him, in part payment, an account which Stanley had against Carter—said account being equal in amount to the *f. fa.*

Claimant then offered and read in evidence, a marriage settlement, executed in the year 1851, before marriage, between said William L. and herself, by which it was covenanted and agreed, that all the property and money that said Rebecca E. should receive from any source, should be her separate estate, and that said William L. should be trustee, with power of investing and reinvesting her funds for her use, and at his death the entire legal and equitable interest in said property and money, secured by said instrument, to be vested in said Rebecca E.

Mrs. Nancey Bass, the mother of Mrs. Stanley, proved, that the negro girl Martha was in her ninth year at the time Doctor Carter sold her; she was purchased from Dr. Carter; William L. Stanley purchased her with the money of Mrs. Rebecca E. Stanley; witness had a mortgage on the girl while

she belonged to Carter; after the sale to Stanley, witness being indebted to him by store account, her mortgage was settled and discharged in part with this account, and the balance by Stanley's note to witness; Stanley had money belonging to his wife, Rebecca E.; he took the bill of sale for the girl in his own name, "and in his account with the said Rebecca, he charged the amount of the purchase money to her—that is, he deducted it from the amount of her money which he had in his hands. It was understood at the time Stanley took the bill of sale in his own name, that the purchase was made for his wife, Rebecca E. Stanley, for she had a promise from Dr. Carter that she should have the refusal of said girl, and this is why Carter went to Stanley to sell said girl."

Robert L. Bass, brother of claimant, proved, that he received money from his grand-father's estate for his sister; thinks it was about one thousand dollars; not more than one thousand, nor less than nine hundred; paid it over to her husband, William L. Stanley. Since the above answer, has found the receipts—one for two hundred and fifty dollars, dated 2d June, 1853, and the other for seven hundred and fifty dollars, dated 8th March 1852, both signed by William L. Stanley, received as his wife's legacy from her grandfather's estate. Stanley, so far as he knows, was a kind husband, but a drunkard, and worthless as to money matters; died insolvent, and this negro is all that is left of his sister's money, or of Stanley's estate, that he knows of; never saw bill of sale; do not know where it is; is Mrs. Stanley's brother; has not the bill of sale; it is not under his control, or in his possession; when Stanley died took charge of the negro.

The jury found the negro subject to the *f. fa.*, and claimant moved for a new trial, on the grounds, that the verdict was contrary to law and evidence, and the charge of the Court.

The court overruled the motion for a new trial, and counsel for claimant excepted.

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J. N. RAMSAY, represented by B. Y. MARTIN, for plaintiff in error.

B. H. HILL, *contra.*

By the Court.—McDONALD J. delivering the opinion.

The charge of the presiding Judge in the Court below, does not appear in the record. Hence, we cannot determine whether the verdict of the jury was contrary thereto. We do not think that the verdict was either against law, the evidence, or the weight of evidence. The title to the negro was the only matter in issue before the jury. If she was purchased and paid for by Stanley, the defendant in execution, she was subject to the judgment, unless, before the lien of the judgment attached to her, she became the property, *bona fide*, of Stanley, as the trustee of his wife. Stanley purchased the girl, and took the bill of sale in his own name. As far as there is any direct evidence of his paying for her, he paid in a store account against the person from whom he purchased, and in a mortgage which Mrs. Bass, Stanley's mother-in-law, held against Dr. Carter, who sold the negro, and which he, Stanley, purchased from Mrs. Bass with a store account which he held against her. These payments were made with the effects of Stanley. But it is testified that Stanley, in his account with his wife, charged the amount of the purchase money to her. There is no evidence as to the time at which the purchase money was charged to his wife's account, whether it was before or after the lien of the judgment had attached on the negro. Without such proof the evidence is against the claimant, and with it, whether the verdict is right depends on other matters which it is useless to consider. As the case stands, the evidence is decidedly with the verdict of the jury.

Judgment affirmed.

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CINCINNATUS M. LUCAS, caveator, plaintiff in error, vs. JAMES M. PARSONS, and others, propounders, defendants in error.

[1] Where the verdict is strongly and decidedly against the evidence, the judgment of the Court below, refusing a new trial, will be reversed.—McDONALD J. dissenting.

[2.] The terms of a proposition to compromise made to a party, and his reply thereto, are admissible in evidence against him.—McDONALD J. dissenting.

Caveat to will, in Monroe Superior Court. Tried before Judge CABANISS, at August Term, 1858.

This case was heard upon the following bill of exceptions: The evidence annexed thereto being very voluminous, and not deemed material to a full and clear understanding of the points adjudicated, is omitted. See 24 Ga. Rep., 640, for a report of this case, on a former hearing before this Court.

Bill of Exceptions.

GEORGIA, MONROE COUNTY:

Be it remembered, that on the 31st day of August, 1858, during the regular August Term of the Superior Court of said county, his Honor Eldridge G. Cabaniss, one of the Judges of the Superior Courts for this State, then and there presiding, the case of James M. Parsons and wife, Elza Holsten and wife, and Peggy Lucas, propounders of the last will and testament of Littleberry Lucas, late of said county, deceased, against Cincinnatus M. Lucas, caveator, then and there pending on the law side of said Court, being on the appeal from the Court of Ordinary, came on to be heard: and both parties having announced themselves ready, and a special jury being empaneled to try the same, the propounders opened their case to the jury, proved the *factum* of the paper propounded by the subscribing witnesses, and closed. Counsel for caveator then proceeded to open his case to the jury, and having proceeded some time in his remarks, counsel for propounders objected to his argu-

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ing the case before the jury in his opening speech. The Court stated the rule to be that in the opening speech, counsel might state his points and legal positions, and the facts which he expected to prove; counsel for caveator then proceeded in his remarks, and was again called to order by counsel for propounders, on the ground that he was going into an argument on the facts before the jury. The Court replied, that counsel must obey the order of the Court, and that was that he might state his points and legal positions, and the facts which he expected to prove, but that he could not go into an argument upon those facts until they were proven, which ruling of the Court was excepted to by the counsel.

Upon the examination of Colin Mulholland, a witness introduced by caveator, counsel for caveator asked him if C. M. Lucas did not come to the warehouse of Field & Adams the day Parsons and L. Lucas was there, and after they had left, and what did C. M. Lucas say at that time? Counsel for propounders objected to the sayings of C. M. Lucas being given in evidence, and the Court sustained the objections, and ruled that if the object of the caveator was to fix the date when Parsons and L. Lucas were at the warehouse of Field & Adams, he might ask the witness, if they were not there the day the cotton was sold, or if C. M. Lucas did not come to the warehouse the same day; but that they could not give in evidence the sayings of the caveator. After some other questions were propounded, all of which were answered without objection, counsel for caveator asked if the Court had decided that the caveator could not prove by the witness that the caveator claimed the cotton? The Court replied that no such decision had been made. Counsel for caveator then asked the witness, if C. M. Lucas did not claim the cotton—the question was not objected to—and was answered in the affirmative by the witness, and counsel for caveator excepted.

While R. P. Trippe, Esq., was on the stand, under cross examination by caveator's counsel, caveator offered

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a paper to be used in evidence purporting to be a compromise, in writing, made by him to James M. Parsons and Elza Holsten, two of the propounders, and asked him if that paper was not submitted to him by one of the counsel for caveator, as a compromise, and which paper was in the following words, viz: "I propose to J. M. Parsons and Elza Holsten to divide with them equally the money, and notes, and negroes given me by my father's will, executed in July, 1845, provided they will agree to divide with me equally at my mother's death the share which she takes in the same will"—this proposition to be accepted or refused in ten days—"Oct'r 6th, 1856."

This paper was objected to by the counsel for propounders. Counsel for caveator, in his argument before the Court on this objection, stated that he expected to prove by another witness, what Dr. Parsons, (one of the propounders) said in reply to that compromise. The Court rejected the paper, on the ground, that the proposition for a compromise was testimony manufactured by caveator for himself, and counsel for caveator excepted.

Counsel for propounders in the concluding address before the jury, took the position, not that the inquisition of lunacy was void, but that it could be set aside on the ground that Littleberry Lucas, the alleged lunatic, was not before the commissioners at the time they made their verdict, and proof to that effect could be made, if a trial for that purpose could be had, and the returns of the commissioners also showed it—a similar point was made by the counsel for propounders, who addressed the jury before counsel in conclusion, counsel for caveator objected to counsel in conclusion proceeding in his remarks on that point, because notice of it had not been given. The Court overruled the objection on the ground that it was not true in fact, and counsel for the caveator excepted.

Counsel for propounders, in his concluding address to the jury, took the position that it was legitimate presumption that, as C. M. Lucas, as guardian of L. Lucas, had a large

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amount of money and notes in his hands, he had in the discharge of his duty as guardian, laid it out in Crawford county, in which he resided, and thereby held many citizens of that county under pecuniary obligations to him, and had acquired an influence over them, and a belief of these facts by L. Lucas, was probably the ground of his belief, that he could not get justice in Crawford county, in a legal controversy between himself and his son, and therefore desired to leave the county, that he might get into a county where more impartial men would pass upon his rights. Counsel for caveator objected, that there was no proof, that C. M. Lucas had laid out any money in Crawford county, and the remarks of counsel were out of order. Counsel for propounders replied, that he admitted there was no proof that any money was laid out by C. M. Lucas; and he had not said, nor did he mean to say that there was any such evidence, but he did say, and intended to say, and had the right to say, that it was in proof that L. Lucas had been declared a lunatic; and that his son, C. M. Lucas, was appointed his guardian by the Ordinary of Crawford county; that the caveator, C. M. Lucas, resided in that county, and had a large amount of money and notes in his hands belonging to his father, L. Lucas, and the presumption of law was, that he did his duty as guardian, and kept the money of his ward at interest; and from that state of facts he had argued that it was a legitimate inference, that the caveator had loaned money to persons who were citizens of Crawford county, and had them under pecuniary obligations. To which counsel for caveator replied, that is a legitimate argument, and no further objections was made.

Caveator offered to prove by Samuel Hall, that he (witness) was present at the March Term, 1856, of Crawford Superior Court, when the case between Littleberry Lucas and Cincinnatus M. Lucas, to revoke the letters of guardianship, was tried; that Francis E. Bacon was sworn on said trial, and testified that he saw C. M. Lucas give said Littleberry Lucas

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\$100 or \$150 00 at Francisville; that said Francis E. is now dead; and that he was a man of undoubted character, and was entitled to full credit; which testimony was rejected by the Court and counsel for the caveator excepted.

Counsel for caveator requested the Court to charge the jury:

1st. That in presumption of law, the testator, Littleberry Lucas, was an insane lunatic, (from age and disease,) on the 2d day of April, 1855; and unless this presumption is removed by satisfactory proof the will cannot be set up; and the burden of removing it is on the propounders.

2d. That while witnesses are allowed to give their opinions, with the facts on which they are based, as to the sanity or insanity of the testator; yet the weight of the evidence is to be determined by the *facts*, rather than by their opinions.

3d. That our position is to be believed in preference to any negative ones; and that witnesses who testify to positive acts of insanity, are to be believed in preference to them who testify that they saw nothing to the contrary of his being sane, though they never examined.

4th. That while the law ordinarily gives strength to the testimony of the witnesses to the will, from the presumption that they examined the testator, yet when it is positively shown that they did not examine him, the strength given to their testimony on this presumption is withdrawn.

5th. That great caution is necessary to be observed in examining the proof of a lucid interval—that such proof is extremely difficult for this, among other reasons, viz: that the patient is not unfrequently rational to all outward appearances without any real abatement of the malady.

6th. That when delusion exists, and can be called forth on any particular subject (it being first shown by the pending of an inquisition that the alleged testator was an insane "lunatic,") then he cannot be said to be in a lucid interval, and before such lucid interval can be established, satisfactory proof must be given of the disorder having been thrown

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off at the time of the alleged execution of the will, and there must be a complete interval of sanity applying to the particular act in question, and if there is anything sounding to folly, it will be conclusive to all legal purposes against the presumption of a lucid interval.

7th. That if the jury believe that Littleberry Lucas's lunacy is not traceable to any fact of circumstances connected with his son, Cincinnatus M. Lucas, but when in that condition he was impressed most unfavorably towards him, apparently without reasonable or adequate cause, and if they believe he was subsequently restored to his reason, except as to feeling towards his son, conceived when in an insane state of mind, and if he continued to suppose that his conceits, formed when in that condition, were true when they were not; and if he acted when making his will, as if they were true, and under a firm persuasion that they were true, and the will was the result of that delusion, then they must set it aside.

8th. That if Littleberry Lucas, was under a guardianship, as a person insane or lunatic, at the execution of the paper propounded, then the burden of proof is on the propounders to show beyond a reasonable doubt, by clear and satisfactory testimony, that he had both mental capacity and freedom of will and action to make a will.

9th. That in estimating the proof of a lucid interval or restoration to sanity, when permanent proper insanity has once been established by an inquisition, little reliance is to be placed upon the opinions of witnesses, but the jury should be guided in their judgment by acts done and facts proved.

10th. Undue influence to invalidate a will varies with the strength or weakness of the testator's understanding; when the capacity is little, a smaller amount of influence will have that effect, especially when the alleged testator is under guardianship, as an insane lunatic from age and disease; that under such circumstances excessive importunity or constant annoyance of the testator, one associating constantly with him and being intimate with him, or supposed to be a fa-

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vorite with him, or having claims upon his bounty, amounts to undue influence.

11th. If Littleberry Lucas was a weak man at the making of the will, and there was any fraud practiced upon him in procuring it, or if the execution of the paper propounded was attended with circumstances that warrant a suspicion that the testator was practiced upon by imposition, then the will is void, and the jury must so find.

12th. That though a person has a right, and it is lawful for him to move a testator to give him his property, even when the testator is a person of weak judgment and easy to be persuaded, and the legacy is great—yet, if in such case, a person does so move a testator, a very strong presumption arises that the moving is of a sort not right or lawful, and only to be rebutted by bringing forward something sufficient to show the will to be such as a person of average mind, morals or family love, might be supposed willing to make.

13th. That if the jury believe there has been a great change of testamentary disposition on the part of Littleberry Lucas, and that there has been a wide departure from a favorite scheme of disposition, and without any adequate or reasonable motive for the same, especially if at the time of making the subsequent will the capacity of the testator is at all doubtful, these are circumstances strongly to show that the will is not the act of the testator, and requires strong satisfactory explanation.

14th. That in arriving at the character of the act under consideration, the terms upon which the testator stood with different members of his family are to be taken into consideration by the jury.

15th. That in determining whether a lunatic, under the control of a guardian, was restored to sanity, or in a lucid interval at the time an act was done, the jury are to look to the state of feeling and mode of thinking of the persons when sane, and if there is a prolonged departure from such feeling and modes of thinking, this is evidence of insanity; if, at the

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time of the alleged lucid interval or restoration to sanity, the state of feeling and modes of thought are not such as usual to the person, while in a healthy state of mind, he cannot be said to be restored to sanity, or enjoy a lucid interval.

16th. If the alleged lunatic converses intelligently and rationally on those subjects upon which he is most deranged, then the jury may consider the lucid interval or restoration to sanity established; but if he does not so converse, it is otherwise; and the mere fact that he so converses upon indifferent subjects, affords no sufficient evidence of restoration to sanity.

17th. That the jury are to take into consideration the evidence of insanity, delusion and undue influence, if they believe there is any existing before and after the making of the will, as throwing light upon these subjects at the time of making the will, and if they believe that such insanity, delusion or undue influence existing both before and after the making of this will, this imposes upon the propounders the burden of showing, by clear and satisfactory evidence, that no such insanity, delusion or influence was operating upon his mind at the time the will was made.

18th. And if they believe these things existed before and after making this will, proof of calmness and of doing ordinary matters of business, is not sufficient to repel the presumption of insanity raised by the inquisition of lunacy and the finding of the jury, declaring him an "insane lunatic from age and disease."

19th. That the jury have no power to pass upon the validity of the will of 1845, but they are to consider it only as evidence of former testamentary disposition and intention.

20th. If the jury believe the paper propounded was made and intended as a mere temporary instrument for a purpose, and the testator intended and attempted to write another will, afterwards, settling his property on his daughters and their children, and was prevented from making such subsequent will by the acts or false messages of James M. Par-

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sons, or either or all of the propounders, then they must find against the paper propounded.

All of which charge the Court gave in the words and language requested by the caveator's counsel, and without any qualification or addition except the first, which the Court qualified by striking therefrom the words, "from age and disease," and the 19th request, which the Court refused to charge in the words and language requested, to which qualifications and refusal caveator's counsel excepted.

The Court charged the jury as follows:

James M. Parsons and wife, Elza Holsten and wife, and Peggy Lucas, have brought a paper into Court, and propounded it for probate, as the last will and testament of Littleberry Lucas, deceased.

To the admission of this paper to probate and record, as the last will and testament of the deceased, Cincinnatus M. Lucas has filed objections on the following grounds, viz:

A want of testamentary capacity in the testator—that is, that at the time of the execution of this paper, as his will, he was not of sound disposing mind and memory.

That at the time said paper purports to be executed, the said Littleberry Lucas was a lunatic under commission, and not capable in law of making a will; and also, at the time of its execution, he was laboring under an insane delusion, or hallucination, as to caveator, and was thereby greatly prejudiced against him.

And that it was obtained by the exercise of undue influence and fraudulent practices on the part of the propounders.

These are the grounds relied on by the caveator to set the paper aside as the will of the deceased.

The propounders, Parsons and wife, Holsten and wife, and Peggy Lucas, say, that the paper offered for probate is the last will and testament of the deceased, and as such, ought to be admitted to record.

The caveator, C. M. Lucas, says that it is not his last will and

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testament, but that it is void on the grounds relied upon in his caveat.

And this assertion on one side, and denial on the other, make the issue, which you must determine, and the question submitted to you for decision is: Is the paper which has been propounded for probate, the last will and testament of Littleberry Lucas? And the consideration of this question necessarily includes the objections relied on by the caveator. All are submitted to you for consideration and decision. The propounders bring the paper into Court, and ask that it be admitted to probate and record, as the will of the deceased. The burden is on them to prove that it is his will.

A will is the declaration of a man's mind, or intention, as to the disposition of his property to take effect after his death.

The law requires certain formalities to be observed in the execution of such an instrument; and a certain state of mind in the person executing it is necessary to give it validity. That these formalities have been observed, and that this state of mind existed at the time of the execution of the instrument, are facts which the person propounding the paper for probate and record must prove.

These legal formalities are, that the will was signed by the testator, and attested by three creditable witnesses, in his presence, and at his request; and the state of mind necessary to give it validity is, that he had testamentary capacity—that is, capacity to know what he was doing at the time he executed it, and that he executed it freely, voluntarily, and without compulsion.

Whether these facts have been proven in the case now before you, is a question for your determination; it is for you to determine and say, whether the paper propounded for probate was signed by the deceased, and attested by three creditable witnesses, in his presence, and at his request, and whether at that time he had a sound disposing mind and memory; or, in other words, capacity to know what he was

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doing, and whether he executed it freely, voluntarily, without compulsion.

If these facts have been proved, the burden of proof is removed to the other side; it then is incumbent on the caveator to show by proof, by legal testimony admitted before you, that the paper propounded for probate is not the last will and testament of the deceased. He must sustain his objections to the paper, as the will of the deceased, by proof. And this brings before you the grounds upon which the caveator relies to exclude from probate and record the paper now under consideration.

The Court will explain to you the law applicable to the several objections against the admission of the paper to probate, as the last will of the deceased. It will then be your duty to determine, according to the law, as it may then be given to you, whether the facts proven are sufficient to set it aside, and authorize you to declare it void.

The first ground of objection is, a want of testamentary capacity in the deceased, at the time of the execution of the instrument alleged to be his will.

It is the duty of the Court to explain to you what, in law, is meant by testamentary capacity. It is your duty to determine whether the facts, which show testamentary capacity or a want of it, have been proven.

By testamentary capacity is meant a sound disposing mind, and memory—that is, the testator must have mind enough to know what he is doing, and memory to recollect what property he has to dispose of, and the person to whom he wishes to bequeath it. He must also have what the law calls the *animus testandi*:—the design, the intention, that the particular paper shall be his last will and testament; or, in other words, that he intended to make a last will and testament, that he intended the paper signed by him to be that will.

To possess sufficient testamentary capacity to make a will, the law does not require a testator to have the same strength of mind, which is necessary to enable him to make contracts,

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and to transact the ordinary business of life. If he has capacity to know his property, and the persons who are to be the objects of his bounty—that is testamentary capacity, and that is all the capacity which the law requires one to possess to make a valid will.

To apply this law to the case now before you, and the paper under consideration—the question for you to consider and determine is: Were the mind and memory of the deceased sufficiently sound to enable him to know and understand the business in which he was engaged at the time he signed it, and did he intend it to be his last will and testament? If he had such mind and memory and such intention, then he had testamentary capacity. These are facts, which you must determine from the evidence, and you must satisfy yourselves from the testimony, whether they have been proven—and in determining this question, you must look to the time when the paper was signed by the testator, as the point at which his capacity to make a will is to be tested, and you must determine whether at that time, he possessed a sound disposing mind and memory. He may not before or afterwards, have had such a mind and memory, as constitutes testamentary capacity, yet if at the time of executing the particular instrument, he knew what he was doing—knew what disposition he was making of his property, and knew who were to be the objects of his bounty, and the relation they sustain to him, he had testamentary capacity, and could make a valid will. His incompetency before or after the execution of the will amounts to nothing, unless it also existed at the time when he signed the paper, and was of such a nature as to show a want of testamentary capacity at that time. That being the point of time to which you will direct your attention to determine the capacity of the testator you will look to the testimony of the witnesses who attested the instrument, and of those who were present at its execution—all other things being equal, the law places more reliance upon the testimony of such witnesses, than it does

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upon those who were not present, for the obvious reason, that the law considers the attesting witnesses, as called upon to examine into and be satisfied of the capacity of the testator to make a will.

But the Court does not mean that you are to look alone and exclusivley to the testimony of the attesting witnesses, and those who were present at the execution of the alleged will—you will look to the testimony of all the witnesses—and if their testimony is conflicting and contradictory, you must not impute perjury to any of them, but reconcile their testimony, if it can be done—but if it cannot, then take into consideration all the circumstances under which the witnesses testified.

It is a rule of evidence that when the testimony of witnesses is conflicting and contradictory, the witnesses are unimpeached—it is the duty of the jury to weigh and compare it, and reconcile it, if it can be done, so that credit may be given to each and every part of it—but if it is irreconcilable—if it is so conflicting that the testimony of one witness cannot be believed, without disbelieving that of another, then the jury should weigh the testimony carefully—look to all the circumstances connected with the witnesses, and under which their testimony is given—their manner of testifying when they testify before you—their means of knowledge—the lapse of time since the occurrence of the events which they detail—whether the facts as to which they testify are of a recent or remote date—the failure of memory from the lapse of time—the degree of credit to be given to their memory—their capacity to judge as to the subject upon which they testify—the relation they sustain to the parties at controversy, and the bias and influence which may operate upon them—look to all these circumstances—compare and weigh the testimony, and give the preponderance to that side, which has the weight of evidence. And in determining the testamentary capacity of the testator, or the want of it, at the time of the execution of the instrument, you will also take into con-

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sideration the circumstances attending its execution, which have been proven before you.

You will look to his means of knowing the contents of the paper—whether the contents were dictated by him and written in accordance with his instructions, and whether they correspond with a previous declared intention—and you are authorized to determine as to the soundness or unsoundness of the testator's mind from all these circumstances, and from his conversation and acts at the time the alleged will was made—and to satisfy yourselves what facts and circumstances attended the execution of the instrument, you must look to the testimony of the witnesses upon this point.

Another ground relied on by the caveator for setting aside the paper, which has been propounded for probate is, that at the time said paper purports to be executed, the said Littleberry Lucas was a lunatic, under commission, and not capable in law of making a will; and at the time of its execution he was laboring under an insane delusion or hallucination as to caveator, and was thereby greatly prejudiced against him.

A man who has been declared a lunatic, and placed under commission of lunacy is competent to make a will, if it be done in a lucid interval, or upon restoration to sanity, though the commission of lunacy still be in force and unrevoaked. It is not necessary to revoke the commission of lunacy to enable a man who has been declared a lunatic to make a will; but to make a valid will it is necessary that he be restored to sanity, or do it in a lucid interval; and when one is declared a lunatic, and put under guardianship, the burden of proving his restoration to sanity is upon those who assert it. The presumption of law is that the lunacy continues until the contrary is made to appear. Though the deceased was under a commission of lunacy, yet, if he had a lucid interval; if at any time he was restored to sanity, it was competent for him to make a will, but the burden of proving the lucid interval, and the restoration to sanity, is

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upon the propounders; and the testimony upon this point must be such as to satisfy you beyond a reasonable doubt. The doubt must be a reasonable one; it must not be an imaginary one, but must actually exist, and must arise from such a state of facts, as to leave the mind in a state of hesitation on which side the truth lies. The proof must satisfy you beyond such a doubt, that the deceased, at the time of signing the paper now before you, was restored to sanity, or did it during a lucid interval; and if an improper or undue influence was brought to bear upon the deceased to induce him to make the will, then the proof of his capacity should be clear, and strong, and undoubted; but if no such influence was brought to bear upon him if he executed the instrument freely, voluntarily, and of his own accord, then ordinary proof of his capacity and restoration to sanity is sufficient.

But the caveator insists that at the time of the execution of the alleged will, the testator was laboring under an insane delusion or hallucination, as to him, and was thereby greatly prejudiced against him.

Partial insanity; a delusion on some particular subject may exist; when such is the case; when the testator is deranged on a particular subject, and is rational on all other subjects, his testamentary capacity is not destroyed, unless the will is the offspring of the delusion, under which the testator is laboring, but if the act can be traced to the morbid delusion, and is the act of that delusion, then the act is void. A delusion is where one supposes a thing to be true, which is not true, and acts in reference to it, as though it were actually true, and under a firm belief that it is so.

To apply the law thus given to you by the Court to the ground of caveat under consideration:

If the deceased was laboring under a delusion of mind upon any subject at the time of the execution of his will, and the will is the result of that delusion, then it is void, though he might have been sane on all other subjects; but unless

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the will be the result of such delusion, the will is not vitiated by partial insanity or delusion on a subject not affecting his mind, when the will was made.

If the deceased was laboring under an insane delusion, or hallucination, in regard to the caveator, when he made the alleged will, and was impressed unfavorably towards him, and without adequate cause, if this unfavorable impression and delusion were conceived, while in an insane state of mind, and were the result of that state of mind ; and if he was subsequently restored to reason in all respects except as to the feeling towards his son, conceived when in an insane state of mind ; and if he continued to suppose that his conceits, formed when in that condition, were true when they were not true, and if he acted in making his will as if they were true, and under a firm persuasion that they were true, and the will was the result of that delusion, it ought to be set aside. But on the other hand, if the deceased, before his derangement, had intended to make another will, and had made that intention known, and the will made is in conformity to such declared intention, a mere resentment against his son, not amounting to a delusion, will not vitiate the will.

Where actual insanity is proved to have once existed, either perfect recovery, or a lucid interval at the time of making the will, must be clearly proved to entitle an alleged testamentary instrument to be pronounced for as a valid will ; but where it is not a case of insanity in the usual acceptation of that term, but the person making the will has been under an aberration of mind from the excessive use of intoxicating spirits, and his unsoundness of intellect is attributable to that cause, and no other, and the excitement, which deranges his mental faculties is produced by immoderate indulgence in spirituous liquors ; the will of such a man is valid, if there is an absence of the excitement at the time of the act done, so far as to show that he acted with reason and deliberation, and with an understanding of what he was doing—

and no other proof of restoration to soundness of mind is necessary in such a case.

If you should come to the conclusion from the testimony that the testator was incompetent to make a will at the time of the execution of this instrument, either from a want of testamentary capacity, or from an insane delusion as to the caveator, you will find for the caveator; but if you should find from the evidence that he was competent, and had testamentary capacity, and was free from an insane delusion as to his son, you will then inquire, whether the paper alleged to be the will of the deceased was obtained from him by undue influence.

To enable you to determine this question, the Court will explain what is meant by undue influence. It is as clearly defined in law as is testamentary capacity—both are so clearly defined that no one can mistake either.

Undue influence when it is shown to exist, is good ground for setting aside a will; but what amount of influence is sufficient to vitiate a will? It is this:

The influence, to vitiate the act, must amount to moral force and coercion, destroying free agency; a complete dominion over the mind of the testator must be obtained; it must not be the influence of affection and attachment; it must not be mere desire of gratifying the wishes of another, for that would be a very strong ground in support of a testamentary act;—further, there must be proof that the act was obtained by this coercion—by importunity, which could not be resisted—that it was done merely for the sake of peace; so that the motive was tantamount to force and fear. The influence exercised in procuring a will, sufficient to set it aside, must be sufficient to destroy free agency.

If the influence amounts to constraint, and prevents the free action of the testamentary capacity of the testator, then it is undue, and a will obtained by the exercise of such an influence is void—it is not the will of the testator, but of the person or persons who exercised the influence.

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Whenever an improper influence is brought to bear upon the mind of one whose mental capacity is naturally imbecile, or impaired by age, intemperance, disease, or from any other cause, proof of the testamentary capacity of such a one, and of the free and voluntary execution of his will, must be clear and strong. If you believe, from the testimony in this case, that such an influence was exerted upon the testator, as constrained him to make a disposition of his property contrary to his free will and desire, you ought to set it aside; but if no such influence was exerted, you will find the paper propounded to be the last will and testament of the deceased, unless it be void on the ground of fraud, which the caveator alleges was practiced upon the testator; or in other words, that it was obtained from him by fraudulent practices.

What is meant by fraudulent practices, is deception practiced upon the testator, by which he was deceived, and induced to make a will, which, if left to himself, he would not have made, or by which, provisions were incorporated in his will, making a disposition of his property different from that which he would have made, if he had not been deceived. Such is what the Court understands to be meant by fraudulent practices. If such deception was practiced upon the testator by the propounders, or either of them; if they procured the will to be made by deception practiced upon the testator, (and you must look to the testimony of the witnesses to determine whether such be the case,) if the evidence be sufficient to satisfy you that this will was obtained by deception practiced upon the testator, then it is tainted with fraud, and should be set aside.

But when the caveator charges the will to be the result of fraud, it is incumbent on him to prove it—unless proof be adduced to show the fraud, the presumption of law is, that there was no fraud, for it is not to be presumed; it must be proved. And it may be proven by circumstantial, as well as positive and direct testimony. Fraud usually conceals itself,

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and it is generally by circumstances alone, that it can be detected and exposed to view; and where circumstances alone are relied on to show the fraud, these, when combined and examined, should be strong enough to satisfy the mind, ^{beyond} beyond a reasonable doubt, of the existence of the fact they are adduced to establish. The proof, when circumstantial, must be strong enough to satisfy the consciences and understandings of reasonable men; and the question for you to determine, is, whether the testimony in this case, positive or circumstantial, is sufficient to satisfy your minds and consciences, that this will was procured to be made by fraudulent practices on the part of the propounders, or either of them; if it was, it is vitiated by the fraud, and ought to be set aside.

To sum up, in conclusion, you are to decide, from a careful consideration of all the testimony before you, whether Littleberry Lucas, had, at the time he executed this will, sufficient testamentary capacity to dispose of his property with discretion and understanding, or whether it was the result of any insane delusion as to his son, Cincinnatus M. Lucas, the caveator—if he had such capacity, and no such delusion existed, then you will inquire whether the will was obtained by the exercise of undue influence, and whether the testator was under such constraint, as destroyed his free agency, and prevented him from disposing of his property according to his own will and desire; if no such influence was exerted, then was the will obtained from him by fraudulent practices. These are the questions for you to consider and determine.

If he did not possess testamentary capacity at the time he executed the will, or if it was the result of an insane delusion as to his son, C. M. Lucas, you ought to set it aside; if it was obtained from him by undue influence, as explained to you by the Court, you ought to set it aside. Or if it was obtained by fraudulent practices on the part of the propounders, or any of them, it ought to be set aside. If any

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of these grounds exist, and has been satisfactorily proven, it is sufficient to authorize you to set the will aside; but if neither ground has been proven to your satisfaction, as prudent and reasonable men, then the paper before you ought to be established as the last will and testament of Littleberry Lucas, deceased. As you may determine the facts, so let your verdict be rendered.

The Court charged, as requested by counsel for caveator, except the first and nineteenth requests. The first was modified by striking out the words "from old age and disease," and the nineteenth was refused altogether.

The jury then retired and brought in a verdict in favor of the propounders, and setting up the paper propounded as the last will and testament of Littleberry Lucas, deceased; whereupon, the caveator moved, during said term of said first mentioned Court, for a *rule nisi* for a new trial, on the following grounds:

1st. Because the Court erred in confining the counsel who opened the case for the caveator, to a bare statement of the facts the caveator expected to prove, and the statement of the legal positions he designed to hold before the Court and jury, and in refusing upon objection to that effect, made by the opposite counsel, to allow caveator's counsel to deduce from said legal position and testimony, the conclusion and references he designed to draw from the premises aforesaid, and to argue to the jury from said facts and law.

2d. Because, the Court erred in sustaining the objection made by propounder's counsel to the testimony of Colin Mulholland, stating, in order to fix the date of the conversation of which said Colin Mulholland testified, that it was on the evening C. M. Lucas came to Macon to see about the cotton stored with Field & Adams, and who said that he had come to claim the same; upon the ground that it was the sayings of said C. M. Lucas, and not a part of the *res gestae*, and in rejecting said testimony.

3d. Because the Court erred in refusing to allow caveator

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to prove by R. P. Trippe, Col. Pinkard and others, that early in October, 1856, C. M. Lucas made a proposition in writing to propounder's counsel, that if the money and notes and negroes and land, bequeathed to him by the will of 1845, constituted the ground of dissatisfaction with the will of 1845, and of fraud against him, he was ready, and offered to give them all up for distribution; that Parsons, one of the propounder, with full information of this proposition, said soon afterwards to Col. Pinkard, "If this proposition is accepted, will the old will be set up;" Col. Pinkard replied, "yes," "except so far as it is annulled by the terms of the proposition;" Parsons replied, "do you think I would accept such a proposition as that," and rejected it; and in refusing to allow the caveator to prove the declaration of Parsons, as above stated: the Court rejected the evidence on the ground, that it would be allowing caveator to manufacture evidence for himself.

4th. Because the Court erred in refusing to allow caveator to prove by Samuel Hall, that he was present at the March Term, 1856, of the Crawford Superior Court, when the case between Littleberry Lucas vs. Cincinnatus M. Lucas, to revoke the letters of guardianship of said Cincinnatus M. Lucas was tried; that Francis E. Bacon was sworn on said trial, and testified that he saw C. M. Lucas give said Littleberry Lucas \$100 or \$150, at Francisville; that said Francis E. is now dead, and that he was a man of undoubted character, and entitled to full credit.

5th. Because the Court erred in allowing propounder's counsel, in conclusion, to argue before the jury, that the inquisition of lunacy was void and irregular, when no notice had been given of such a ground in the preceding argument; and in overruling caveator's objection thereto; and in allowing said propounder's counsel, to argue that C. M. Lucas had loaned out thirty or forty thousand dollars in his hands, as guardian of L. Lucas, to people of Crawford county, with a view of influencing public sentiment there in his, said

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C. M. Lucas' favor, when there was no proof of such facts, and in not stopping him upon the request of caveator's counsel to that effect, and in not expressing disapprobation of his course, when said counsel declared, in the presence of the jury, that he had gotten it out, and as sensible men, they would have to be influenced by it, whether it was regular or not.

6th. Because the Court erred in refusing to give in charge in the words and language requested, the first request made by caveator's counsel, as follows: "That in presumption of law the testator, L. Lucas, was an insane lunatic, from age and disease, on the 2d day of April, in the year 1855, and unless this presumption is removed by satisfactory proof, the will cannot be set up, and the burden of removing it is on the propounder," and in striking from them the words "from age and disease."

7th. Because the Court erred in refusing to give in charge in the words and language requested—the request of caveator's counsel as follows: If the jury believe the paper propounded was made and intended as a mere temporary instrument for a purpose, and the testator intended and attempted to write another will, afterwards, settling his property on his daughters and their children, and was prevented from making such subsequent will by the act, or false messages of James M. Parsons, or either or all of the propounders, then they must find against that paper propounded—and in refusing to charge the same, or any part thereof, and in giving no charge upon the subject embraced in said request.

8th. Because the verdict of the jury is contrary to law and evidence, and decidedly and strongly against the weight of evidence.

9th. Because the charge of the Court was abstract and general—not applied to the facts, and circumstances of the case, and was well calculated to mislead and confuse, and did, in fact, mislead and confuse the jury.

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The Court refused the motion for a new trial, and counsel for caveator excepted.

STEPHENS; HALL; HILL, for plaintiff in error.

TRIPPE; POE & GRIER; NORMAN, *contra*.

By the Court.—LUMPKIN J. delivering the opinion.

[1.] The great question made by the record in this case, and the one chiefly argued by counsel on both sides, is, whether the Court below erred in refusing to grant a new trial on the 8th ground, in the motion for a new trial, “because the verdict was contrary to the law and evidence, and decidedly and strongly against the weight of evidence.”

The evidence is voluminous, and the witnesses give different opinions, as to the capacity of the testator at, and about the time of the *factum* of the will, but the main current of facts in relation to the testator’s “mind and habits, and affections,” seem to be very well agreed on by nearly all the principal witnesses on both sides. The evidence makes us distinctly acquainted with the testator as far back as twenty years before the making of the paper here set up as his will, and there is some evidence going much further back, but it is unnecessary to consider it. Prior to the winter of 1853 and 1854, the testator was a sane man; after that time, it is conceded by the propounders, that he became deranged, at least a lunatic. The propounders insist, however, that he was restored to his reason, or at least had a lucid interval, on the 2d day of April, 1855, and this is denied by the caveator, and this is the main issue.

Before the loss of his reason, Dr. Hall says he was “a clear headed, discriminating person in ordinary business matters, respectful and decent in his deportment.” All the witnesses who speak on this point, corroborate this statement. He was a practical, thriving business man, careful with his

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property, very successful in farming, and in the use of money ; he was a drinking man, and sometimes drank too much ; and when drinking fond of jesting ; "but he was never irrational," "never indecent in his deportment," never substituted "imaginary things for facts," even when he had drunk too much. "He was just as hard to trade with under the influence of liquor, as at any other time."

He had great domestic troubles ; he and his wife did not live happily together ; her temper was unfortunately affected by a hysterical disorder, but this kind of life was not uniform and continuous ; there were times when her temper gave way, and then there was greater harmony in the household. At times, they did not speak to each other, nor did they room together. He often complained of his hardships in these respects, and declared his domestic troubles drove him to drinking. A poor, but common refuge in such cases. Many other evidences of unhappiness are stated in the record, which I need not repeat. He had two daughters ; one married Elza Holsten, and the other married James M. Parsons ; neither married to suit him. The last, especially, married clandestinely, and very much against his will ; for sometime after this marriage, the witnesses say, the testator "hated Parsons;" afterwards he said he would make the best of it, and some of the witnesses say "he came to respect Dr. Parsons;" Holsten, he declared, was not of much force any way. It is very clearly shown, that always before his insanity, Littleberry Lucas declared, neither of these men should ever have his property "*if he died in his right mind.*"

The testator had one son, the caveator in this case ; in this son, and his family, this old man seems to have found all his happiness. Our brother Hill speaks of this son as the old man's cloud by day, and pillar of fire by night," and even our brother Tripp, the counsel for the propounders, admits that Cincinnatus M. Lucas "was at once the old man's Reuben and Benjamin." With a force which a glad

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father's heart alone could express, the testator was in the habit of declaring that "Nat, his son, was all a father's heart could wish." After a careful examination of the evidence, we must admit, that none of these eulogies can be called extravagant. As a natural result, this son had all his father's confidence. He kept his money and notes, attended to all his business, "helped him to make what he had," and it seemed to be the father's delight to do just as his son said. He bought a new secretary for the safe keeping of his papers, and had it carried, not to his own, but to Nat's house. If a neighbor came to borrow money, he sent him "to Natty;" if cotton was to be sold, or an overseer employed, or anything else done, "Natty" must do it. The wisdom of this confidence is seen in the result—the old man continued to grow rich. With this clear head, and these fixed affections, old Mr. Lucas, sometime before 1845, called on his neighbor, Mr Lester, to write his will; it was very carefully prepared. The testator and the scrivener, at the instance of the first, sought a retired place, and Mr. Lucas had his plan for disposing of his large estate, all arranged; he gave his wife a competency; he settled upon his daughters, portions for life, remainder to their children; he gave Cincinnatus's sons a special legacy "to perpetuate his name," as he said; he gave his faithful old negroes, "who had worked with him, and through the heat and burthen of the day," to his son, for "Natty would take good care of them;" he stated to Mr. Lester his reasons at the time, for so making his will, and for giving his son's family the advantage, and they are in strict accordance with the facts above stated; "it was a rational act, and rationally done."

Some time after this, he bought a plantation west of Flint River, and put certain negroes on it; this he did for his son's "boy children;" he bought it for them, and gave it to them, and often spoke of it, and gave his reasons for it. Many of the witnesses detail many facts showing the old man's fixed purpose in this regard. To fix this property on Nat's boys,

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as a gift from their grandfather, in token of his affection for them, and their father and mother, "and to perpetuate his name;" he destroyed the will drawn by Mr. Lester, and on the 7th day of July, 1845, made another; this will was also made with great care; it was drawn by his confidential attorney, is elaborate, and well planned, and precisely as the one described by Mr. Lester, with the exception of the change of legacies to the children of his son. At this time, Littleberry Lucas lived in Monroe county; in 1847, he applied to the Legislature to change the county lines, so as to include him in the county of Crawford, stating in his sworn petition for this purpose, that he had made his will, that his son was appointed his executor; that most of his lands and property lay in the county of Crawford, where also his son lived, and for the convenience of his son in executing his will, he wished to be placed in the county of Crawford; the Legislature granted his petition; afterwards, at the session of 1851-'52, an Act was passed repealing generally the former Acts changing the county lines, and this placed Littleberry Lucas back in the county of Monroe; to the very next session of 1853-'54, he sent his petition to be placed back again into Crawford county; he asked Col. Hunter to assist Mr. Culverhouse and Ray, in getting this bill passed, as he was thrown back into the county of Monroe, against his wish, and wished to be placed again in Crawford, for the convenience of his executor; this bill was also passed, and approved the 13th day of February, 1854; he also became dissatisfied with some decisions of this Court, because he had understood they conflicted with the settlement of his daughter's; he brought his will to his lawyer, Col. Hunter, in the fall of 1853, as Col. H. recollects, for examination in this particular, and when informed that his will did not conflict with the decisions of the Supreme Court, he expressed himself pleased, and again expressed his particular satisfaction with these portions of his will, and repeated the same reasons for them which he had given so often before. Up to this

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period, and to these points, the testimony is clear, strong, and unbroken. By the will of 1845, he gave his money and notes, to his son Cincinnatus; some three of the witnesses think he expressed a dissatisfaction with this portion of his will before his derangement; Mr. Banks says he spoke to him to write a new will on this account, in May, 1853, but did not say how he would make it otherwise, and never appointed a time to attend to it. Mr. Woodward and Mr. Jackson also spoke of hearing similar remarks before his derangement, but they are not certain as to the time. Admissions and casual remarks, unless well remembered, and distinctly repeated, furnish very weak evidence.

We know the human memory is at fault, in nothing more than dates, unless particularly charged to remember them.

Most clearly, therefore, the will of 1845 contained and represented the testamentary intentions of Littleberry Lucas, when sane, and admitted, on all hands to have been sane. The time when Mr. Lucas became insane is not definitely fixed; Dr. Hall, an experienced physician, discovered some symptoms of it, he thinks, as far back as shortly after 1850; he was getting quite old—near the period allotted for man to live; his insanity was doubtless produced by a combination of causes; the manifestations of the malady of madness were numerous, and unmistakeable; we will mention some of the more prominent, for the purpose of tracing with more certainty, the evidences of his condition on the 2d day of April, 1855.

With a few immaterial exceptions of *opinions* to the contrary, it is conceded by all, that this old man had not his reason in 1851; he lost all sense of decency in the presence of ladies; he was untruthful; he offered a young lady \$200, and when she refused to receive it, he was about to burn it in his pipe, and was only prevented by her consenting to take it; he was traveling over the country declaring his wife was dead, and he wanted to marry again; addressed several ladies; offered to buy a wife, at prices varying from

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small sums, or a few negroes, up to \$20,000; he declared he could buy a wife, and would do it; (was this madness? Quere;) when corrected in any of his wild notions, he would get angry, and insist he was right; he insulted his own sister-in-law, at her own table; was offering to sell his negroes at times, for the wildest prices, and then for almost nothing; all the family united in having him declared *non compos*; and in having a guardian appointed under our statute; accordingly, a commission was sued out, on the 30th day of June, 1854, he was declared an insane lunatic from age and disease, and incapable of managing his own affairs;" his son was appointed his guardian; his affections entirely changed; he took up with Parsons and Holsten, and his hatred for his son was the most intense; he would curse him as the d——st rascal, and rogue, and fool, that ever lived; charged him with stealing his will, and his property, and declared he intended to make a will, and cut him off with \$5, as being all the law allowed him. All these manifestations of insanity are testified to by many witnesses; pages could be filled with his sayings and doings, illustrating this sad condition.

Was he restored, or at least, did he have a lucid interval when he executed the paper propounded? It is scarcely possible to be too strongly impressed with the great degree of caution necessary to be observed in the examination of the proof of a lucid interval. *White vs. Dwyer*, 1 Ecc. R. 46. In cases of insanity proper, this proof is often matter of extreme difficulty, because the patient so affected is not unfrequently rational to all outward appearance, without any real abatement of his malady, so that in truth and substance, he is just as insane in his *apparently* rational, as he is in his visible raving fits. *Brogden vs. Brown*, 2 Ecc. R. 369.

These considerations render it necessary for the Courts and juries to rely but little upon mere opinions, but to look at the grounds upon which opinions are formed, and to be guided in their own judgments by *facts* proved, and by *acts*

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done, rather than by the judgment of others. *Kinleside vs. Garrison*, 1 Ecc. R. 296; 1 Williams on Executors, 2d Am. Ed. 18.

When general lunacy is once shown, it is not sufficient in order, to establish a lucid interval, to show merely a cessation of the violent symptoms of the disorder, but a restoration of the faculties of the mind, sufficient to enable the party soundly to judge of the act. *Hall vs. Warner* 9 Ves. 611.

Was Littleberry Lucas so far restored as to be able to comprehend the condition of his family and property, to remember his affections, obligations, and former testamentary intentions? Was he relieved of his delusions in regard to his son, or did he act on these delusions?

After a careful examination of the facts proved, and acts done, we find every exhibition of insanity existing in 1854, continuing in 1855, and many of the most palpable evidences of such insanity shown in this record, occurred in 1855—many of them a short time before, and many a short time after the 2d day of April, and on that very day, we find several strong “soundings to folly,” declared by the authorities to be proof, in spite of apparent calmness, of the continuance of the malady.

Let us state a few clearly proven instances, as samples of many in this heavy record. Dr. Hall says: “I had a meeting with him, (L. Lucas) I think in March, 1855, a short time before the April Term of the Court of Ordinary, for the purpose of bringing about a reconciliation between him and his son; I asked him in the street, if he had been to see Nat; he said no, that he had as soon go to hell as to go there; that Nat was a damned rascal, and a damned rogue, and made use of the most violent and abusive terms.” Dr. Hall attempted to reason with him, and correct his mistaken imaginations about Nat’s conduct, when “he renewed his buse of his son in such a violent and abusive manner, that concluded he was still laboring under his derangement;”

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"he was sober at the time, and the indications of insanity I allude to, I did not think the effects of drink operating at the time, or produced by liquor recently taken." George Rousseau, a brother-in-law to Littleberry Lucas, says, "he also visited my house in 1855; while here he said a man that was not worth \$70,000, ought to be kicked out of hell; he also said he did not know whether there was any hell or not, and he be damned if he was going to trouble himself about it. There was a quilting at my house while he was here, and when the quilt was finished, he proposed to a lady of as much respectability as any in this, or any other country, that they would wrap up in the quilt, and go to bed; this was said in the presence and hearing of several persons, and I should not have allowed him to stay in the house, but from the fact that I regarded him as an insane man; he did not drink any spirits while here the last time, nor did I consider him drunk when he came here."

William H. Griffith says, that the "*latter part of March, or early in April, 1855*, he had a conversation with L. Lucas, in which he spoke of Nat as a rogue, a rascal, *and the most hateful of men*; said Nat *pretended* to have some Court papers giving him his property; that he knew all about such papers, and that Nat could tear them up if he would; that he and Nat could agree, and put them out of the way, and he wanted Nat to do it, but he would'nt, damn him; no such rascal shall ever have anything I have got; he shall come to the plough, damn him."

Samuel P. Corbin says: "A man had died, and been put into a metallic coffin; the coffin was brought to my house, and Littleberry Lucas took a complete view of it, felt it, and knocked it with his knife—seemed amazed, and made many foolish remarks about it, illy becoming the occasion; he then said, "when I die, I want one of these things to be buried in; the devil can never get a man when he is boxed up in one of these." This was not said jestingly; he said it with a countenance as solemn as he ever wore;

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he seemed to speak it, as if he believed what he said. This was about the 1st of May, 1855; I saw him in *March*, and *April*, of the same year, and he was as crazy then, as at any time before, or after."

On the very day of making the will, he requested J. M. Simmons, one of the witnesses to the will, to tell "his brother not to send his note to Nat Lucas, that he intended to have his business out of Nat's hands;" and yet, when sane, and for years, no one else could be trusted with his business." *Woodward*, another witness to the will says, that L. Lucas "said, after he made his will, that if Nat Lucas did not give him up his property, he would be damned if he did not cut him off with five dollars; said so before."

John Anderson, a witness to the will says, he saw Mr. Preston, in Knoxville, on the day the paper propounded was written. Mr. Preston's depositions were read, and he says he saw L. Lucas in Knoxville about the last of March, or the first of April, 1855, and he further says, that deceased "called Nat many ugly names, and cursed him dreadfully; he spoke of Nat as the most hateful of men; he found it difficult to find words of sufficient force to express his spite; he was then insane;" he said at Knoxville, in my hearing, that he did not mean to give Nat anything, because he was the damnedest rascal he ever saw.

On the night of the very day he made the present will, he told B. F. Pritchard "he intended to make a will, and do as he pleased with his property."

Mr. Knott says, "In the Spring of 1855, while L. Lucas was in Macon, he told me he had been offered 14 cents for his cotton, which was about 4 cents over, what any other cotton would have brought that day, and during the same day, speaking of the birth of children, said he recollect well when the granny came to his birth; some one told him he must be mistaken; he said, oh no, he was not."

A. W. Wyche was present at the time spoken of by Mr. Knott, and was the man who asked deceased, if he was not joking

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Lucas said "no, and then reaffirmed it to show the strength of his memory. He went on further to say, in the same earnest manner, that he remembered when the granny entered the room when he was born, and he described her, how she looked, &c." Both these witnesses examined closely to see if he was under the influence of liquor, but both became satisfied that he was not, and that he acted and talked as a crazy man, and not as a drinking man. Previously when sane, he had always gone to Macon with his son, and did just as he said. Now, at the time alluded to, Dr. Parsons accompanied him, and on that same day, deceased said "he had more sense in his little finger than Nat had in his head, and he cursed him for a damned rascal, and a damned fool, &c."

In May, 1855, he offered to give in his property to the Receiver of Tax returns in Taylor county. He had about sixty negroes there, but represented them as about 42; insisting that small ones who did not work, should not be given in. He had a good plantation of about 1000 acres, and this with the 42 negroes, he valued at about (\$2,700) *twenty-seven hundred dollars*. The sensible Tax Receiver would not allow him to swear to it, because he thought him crazy. This is testified to by three witnesses, who say he was not drunk at the time, but crazy. If he had sworn to this valuation, would any jury on earth, have found him guilty of false swearing? His son returned the same property at near \$40,000.

"Facts proved, and acts done," showing this condition of mind, are multiplied by more than a score of witnesses which need not be, and cannot be repeated. They cover the whole of the year 1855. The danger of relying upon opinions *in a case like this*, as wisely remarked by Sir John Nicholl as above quoted, is strongly illustrated in this case. For the witnesses who *think* he was rational, give it as their opinion, that he was sane, *having no indications*, of derangement, the whole of the year 1855; the very period when the *facts* testified to, occurred. Some of them say he was restor-

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ed in the fall of 1854, and one or two intimate, as their opinion, that he never was deranged. Some people seem to think a man is not *crazy* unless he is *frantic*. That Mr. Lucas was often calm, and quiet, and loaned money to Mr. Jackson on one occasion, and shaved a note for Dr. Simmons, on another, and did so with apparent reason, we do not doubt. Many lunatics, and deranged men have done many things requiring much more thought, and judgment. Doubtless Mr. Huckaby honestly thought Mr. Lucas, was as sound as any man, when he sent for him to mend the harness, &c.; and that too, notwithstanding Mr. Lucas concluded he would himself "tan the leather to mend the harness," and Mr. Huckaby himself thought the harness were not worth mending at all.

The circumstances also, under which this paper was written, cannot help the propounders on the question of sanity. The deceased was mad, excited because his son had continued the application to revoke the letters of guardianship. The will was made in the Court room; no deliberation, no plan arranged, no good feeling for that son who was once all a father's heart could wish a son to be; in every respect so different from the circumstances under which he had written and prepared two wills before. To settle his daughters' portions to their separate use, and "extend his property over to his grand children," and make a special bequest to Nat's boys, "to perpetuate his name," were always the cherished intentions of this old man when sane. They were the great features of two former wills. To execute this testamentary intention, he applied to two sessions of the Legislature, to place his residence in Crawford county, where his son, and executor lived. He became dissatisfied with a decision of this Court, because he heard it interferred with one of these provisions in his will. He never did, so far as the proof goes, abandon either of these intentions. He never, while sane, tolerated any other contrary intention. These were his great, his fixed, his life long testamentary intentions.

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The record of his sane moments is unbroken, and full of them. All his family and neighbors knew them. And yet when he executed the paper now propounded, it does not appear that he even *recollect* either of these former purposes. Yet this paper defeats these cherished objects, and for only one recited reason of dissatisfaction with his former will—a dissatisfaction which could have been fully remedied by a codicil of five lines.

There is yet another view of this case which materially weakens the cause of the propounders. Even if Mr. Lucas probably had testamentary capacity, it is clear he was of *weak mind*. “Unquestionably,” says Sir John Nicholl, in speaking of the will of one under commission of lunacy, “there must be a *complete* and *absolute* proof that the party who had so formed it, (the will) did it without any assistance.” *Cartright vs. Cartright*, 9 Ecc. R. 51. We are not satisfied that the paper propounded is the free, and voluntary testamentary act of Littleberry Lucas. With such a revolution of testamentary intention while in the care of those benefitted by the change, and under such circumstances of suspicion, and weakness of mind, the law must have strong proof of both volition and capacity. *Walker vs. Hunter, et al.*, 7 Ga. R., 414, *Wynn vs. Robinson*, 4 Ecc. R. 82; *Brydges vs. King*, Ib, 113; *Ingrain vs. Tryatt*, Ib, 191, 204.

The evidence in this case presents some strong proof of fraud, and *significant activity*, to say the least of it. The deceased was *helped* in various ways.

All the family wanted a “trustee” appointed for him. Dr. Parsons was especially urgent, and thought *Nat* was the man who ought to be appointed. After Nat’s appointment, the propounders became the best friends of the deceased, and his special keepers. Dr. Parsons “treated Littleberry Lucas, while in Lucas’ presence kindly, and as a sane man, but away from said Lucas, he treated him as an “insane man.” He bid off land for the deceased at Smith’s sale. He, and Holsten helped the deceased to sell his cotton, over the head

and wishes of his guardian. Dr. P. first applied to Col. Trippe to bring the *rule nisi*, to revoke the commission of lunacy, and was the active man in getting up the witnesses. It does not appear that either of the propounders made any effort to disabuse the father's mind in regard to the conduct of his son. According to the old man's ravings they were active in embittering him against his son.

Again, the old man is raving—anxious, apparently, to get the commission of lunacy revoked, but Parsons says to Col. Hunter, "if C. M. Lucas will give up the old will no steps will be taken to revoke the letters."

The old man is raving, because under the old will, Nat is to get all his money, and notes, and says he wants to alter it for that reason. But Parsons told C. M. Lucas, at Smith's sale, in the presence of Woodward, "*if he would give up the old will he might keep the money and notes.*" In no case would the granting of the propositions of Parsons have accomplished the wishes of deceased, and yet he pretends to have acted for deceased. In February or March, 1856, the old man seems determined to move to Monroe county; (while sane, he was very anxious to die in Crawford.) It was a bad season of the year to get a place. The old man was very old, was bed ridden, and unable to move without assistance. But Parsons declared he would move him to Monroe, if he had to move him to a shelter. No other place being available, Holsten finally gives up the place he was living on in Monroe, and thither the old man is carried, *to die*. After this removal to Monroe, *Holsten* said he *thought the new will would stand*. In the summer of 1856, another will was spoken of. Mrs. Peggy Lucas sent for Dr. Stephens, Dr. Searcy and Dr. Simmons to examine the old man and see if he was then competent to make a will. They met, and so pronounced him, and a time was appointed for the will to be executed by these physicians. This proceeding thus far was without the knowledge of Dr. Parsons. But before the day arrived to execute the will, he found it out.

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He, Parsons, told Dr. Simmons not to come, because the women had deceived him, that the old man already had a will. He then went to Forsyth, and told Dr. Stephens he *need not come*, as the old man was sinking, &c. He wrote to Dr. Searcy not to come, "because Dr. Stephens would not be there." Mr. Hollis heard the discussion between Dr. Parsons, and the women, on the subject of the will. Mrs. Lucas and Mrs. Parsons wanted a will *settling the property on the daughters*, but Dr. Parsons was afraid it would affect the *revocation*. Dr. Stephens, on reflection, did go down on the day appointed to write the new will, but no one was there but the old man, and the women. The old man was sleepy, and the women "had concluded to be satisfied." We are not *satisfied*, either that the paper propounded was executed during a lucid interval, or that in the weak condition of the mind of the deceased, the will was not the result of undue influence. The burden was on the propounders, and the weight of the evidence is strongly and decidedly against them. We think the Court erred in not granting a new trial on this ground. For myself, I will say that when this case was up here before, my mind inclined to this opinion. After a full re-examination and argument, with the additional evidence, I do not, and cannot entertain a doubt on this point. 24 Ga. R., 663.

But it has been insisted that the paper itself is sufficient evidence of sanity, because it divides the property equally. *Cartright vs. Cartright*, is relied on for this position. On examination, the will of Armyne Cartright will be found in every respect different from the one before us. That will gave all the property to one side of the house, and yet it was said to be natural. Why? Because it was in strict accordance with the attachment of the deceased, and her testamentary intentions while sane. This is not pretended for the will of Littleberry Lucas. Miss Cartright wrote her own will alone, and there was *absolute proof* of absence of fraud, and undue influence. The very essence of a will is the *wish of*

the testator. His *affections*, therefore, rather than apparent equality, is the true test of a natural will. According to the judgment and feelings of Littleberry Lucas, for many years of his sane life, a will equal on its face was not equal in *fact*, and did not represent his *wishes*. In *Cartright vs. Cartright*, Sir William Wynne said, "it was a proper and natural will, and *conformable to what her affections were proved to be at the time*." Where is the slightest evidence in this whole record, that Littleberry Lucas ever did for a moment change his affections and intentions as represented in the fourteen first items of the will of 1845? Was not one of the very last acts of his sane life a solemn reaffirmance of that whole will?

[2.] During the progress of the trial, and while Col. Trippé was on the stand, the caveator's counsel sought to prove by him the submission to propounders by caveator, of the following proposition to compromise the case, viz: "I propose to J. M. Parsons and Elza Holsten to divide with them equally the money, and notes, and negroes, given me by my father's will, executed, in July, 1845, provided they will agree to divide with me equally at my mother's death, the share which she takes in the same will. This proposition to be accepted or rejected in ten days. Oct. 6th, 1855." Signed, by C. M. Lucas. The caveator's counsel further stated to the Court that they expected to shew that Parsons replied to this proposition as follows: "If this proposition is accepted will the old will be set up?" Col. Pinckard said "yes, except so far as it is annulled by the terms of the proposition." Then Parsons replied, "do you think I would accept such a proposition as that," and rejected it. The only purpose of introducing the proposition was to make the reply intelligible, and the object of proving the reply, was to show that the propounders were not opposed to the old will of 1845, because the money and notes were left to C. M. Lucas; the ground which caveator insists was always put in the mouth of deceased while deranged, but because of the settlements to the

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separate use of the daughters, and the special legacy to C. M. Lucas' children. The Court rejected the evidence on the ground, that it was enabling caveator to manufacture evidence for himself. We do not see how caveator manufactured the reply of Parsons, and that is the real evidence sought. Our brother Trippe is very indignant, because the proposition does not include Mrs. Lucas. A sufficient reply to that is, that Dr. Parsons did not reject it for that reason, and his reply is the real evidence sought.

The evidence proposed, is the sayings of a party to the record, and is certainly good against him, and against all, who, with him, seek to set up a paper which the caveator alleges was fraudulently procured. We think the evidence was admissible, and reverse the Court below, also, on this ground.

Judgment reversed.

BENNING J. concurring.

The Court are unanimous, that all of the decisions complained of, except two, ought to be affirmed. As to those two, they are not unanimous. Judge LUMPKIN and myself, thinking, that those two were erroneous, Judge McDONALD thinking, that they were not erroneous. The opinion of the Court, on all of the decisions complained of, except those two, will be stated by Judge McDONALD.* I shall therefore, confine myself to those two.

Of them, the first is thus set forth in the bill of exceptions: "While R. P. Trippe, Esq., was on the stand under cross examination by caveator's counsel, caveator offered a paper, to be used in evidence, purporting to be a compromise in writing, made by him to James M. Parsons and Elza Holsten, two of the propounders, and asked him, if that paper was not submitted to him by one of the counsel for caveator,

* The opinion of Judge McDONALD here referred to, has not been furnished to me.—*Reporter.*

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as a compromise, and which paper was in the following words, viz: "I propose to J. M. Parsons and Elza Holsten, to divide with them equally, the money, and notes, and negroes, given me by my father's will, executed in July, 1845, provided, they will agree to divide with me, equally, at my mother's death, the share which she takes in the same will—this proposition to be accepted, or refused in ten days. October 6th, 1856."

"The paper was objected to by the counsel for propounders. Counsel for caveator in his argument before the Court, on this objection, stated, that he expected to prove by another witness, what Dr. Parsons, (one of the propounders,) said in reply to that compromise." And what Dr. Parsons said in reply to it, was as follows—"If this proposition is accepted, will the old will be set up?" Col. Pinckard, replied: "Yes, except so far as it is annulled by the terms of the proposition"—Parson's replied: "Do you think I would accept such a proposition as that;" and rejected it.

The Court rejected the evidence, and that is the decision complained of.

The question, therefore, is, was the decision right?

In other words, was the caveator entitled to have before the jury, Parsons's reply to the proposition?

The will of 1845, made provision for the wife and children of Parsons, but made none for Parsons himself. The reply of Parsons betrays extreme hostility to that will. The property which C. M. Lucas thus proposed to divide with Parsons and Holsten, was valuable, amounting, according to some of the testimony, to, as much, I believe, as forty thousand dollars, yet Parsons's repugnance to the old will was so great, that he preferred to reject a third of this property, and stand the chances for establishing the new will.

It is true then, that his hostility to this old will, was extreme.

Was it competent in the caveator, to show, that Parsons entertained such a feeling of hostility to that will? The an-

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swer to this question, depends on whether that fact would, or would not, be material to any of the issues.

Among the grounds of the caveat, are these two; that the new will was obtained by the propounders, by undue influence; that it was obtained by fraud. Parsons was one of the propounders. Among the issues then, were those of undue influence and fraud, in Parsons. Now, whatever was *material* to these, two issues, was admissible in evidence. And it was, certainly, material to those issues, whether Parsons had, or had not, a motive or cause, for resort to undue influence or fraud; as, it is material, on an issue of murder, whether the accused had, or had not, a motive to kill. True, in this last case, the mere existence of the motive, (hate or friendship,) is not sufficient to establish guilt or innocence—but, still, it is a fact *material* to the issue of guilt or innocence. So, although, it may be true, that the mere existence in Parsons of a motive for a resort to fraud or undue influence, would not be sufficient to convict him of fraud or undue influence, yet it would equally be a fact *material* to the issue, whether he was, or was not, guilty of the fraud or undue influence. It would be a fact, which, though, not sufficient of itself, to establish guilt or innocence, might be sufficient, with other facts, to do so.

If then, there existed in Parsons, a motive for the use of fraud or undue influence, it was a fact material to the issues as to fraud or undue influence, and therefore, was a fact admissible in evidence on those issues. And, of course, any facts going to show this fact; that is, going to show the existence of this motive in Parsons, would also be admissible.

Now extreme hostility in Parsons, to the old will, would be a fact going to show a motive in him to resort to any means, not excepting fraud or undue influence, to get rid of that will. Therefore, any fact going to show this hostility in him, would be admissible as evidence. His reply to the proposition for a compromise, was a fact going to show this hostility. .

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My conclusion, then, is, that this reply was admissible as evidence. Of course, I think, that the proposition ought to go with it, to make it intelligible. What it would be worth, when admitted, would depend on what other facts were in evidence. By itself, it would not be sufficient, to establish fraud or undue influence.

The other of the two decisions, is, the decision that the verdict was not decidedly and strongly, against the weight of the evidence. In my opinion, this decision was erroneous. In my opinion the verdict *was* decidedly and strongly, against the weight of the evidence. The evidence is voluminous, and it would take much more time, than I have to spare, to give my reasons in detail for this opinion. I will simply remark, that, as Littleberry Lucas had been found a lunatic by due judgment of a proper tribunal, which judgment was still in force when the new will was made, the onus was on those who propounded that will, to show, *beyond a reasonable doubt*, that he was not a lunatic at the time when he made that will. This I think, they were far from showing.

McDONALD J. dissenting.

JOHN KNIGHT, et al., plaintiffs in error, vs. WILLIAM KNIGHT ²⁷ _{el124} ⁶³³ ₈₀₆
administrator, defendant in error.

A. dies testate in Henry county. His will is proven and admitted to record in that county. An application is made to revoke the letters testamentary, on account of the birth of a posthumous child unprovided for. In the meantime, that part of Henry county including the testator's residence, at the time of his death, has been cut off into Spalding; and the administrator *de bonis non cum testamento annexo*, has removed to Texas.

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Held, That Henry county had jurisdiction of the proceeding; that the right to transfer to Spalding was a personal privilege, and that in this and all similar cases, all done previous to the application in the original county, was rightly done, and valid.—MCDONALD J. dissenting.

Proceedings to set aside and vacate will, and to declare an intestacy, in Henry Superior Court. Before Judge CABANISS at April Term, 1858. Appeal from Ordinary.

This case was heard in the Court below, upon the following agreed statement of facts:

Charles Knight died in the county of Henry, and his will was admitted to probate in common form, in the Court of Ordinary of that county. Some years after the probate of the will as aforesaid, the new county of Spalding was created and organized, and that portion of the county of Henry, in which testator resided at the time of his death, was cut off and included in the new county of Spalding. This was an application in the Court of Ordinary of Henry county, on the part of John Knight and others, to vacate and set aside the probate of said will, and to declare an intestacy on the ground of the birth of a posthumous child of deceased, unprovided for by his will. The administrator with the will annexed, had removed to the State of Alabama, and a rule to show cause, &c., had been served on him by publication.

At the trial, counsel for the administrator moved to dismiss the proceedings, on the ground that the Court of Ordinary of Spalding county, and not of Henry county, had jurisdiction of the cause. The Court overruled this motion.

Counsel for the administrator then moved to transfer the case to the county of Spalding, to be there tried and disposed of. This motion the Court granted, and ordered the cause to be transferred to the Superior Court of the county of Spalding; and counsel for movants excepted.

DOYAL & NOLAN; and TIDWELL & WOOTTON, for plaintiffs in error.

J. Q. A. ALFORD, *contra.*

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By the Court.—LUMPKIN J. delivering the opinion.

We see no constraining reason for reversing the judgment of the Circuit Court, directing this case to be transferred to Spalding county. Should the probate of the will be vacated, as it likely will be, and an intestacy declared, on account of the birth of a posthumous child, unprovided for, letters of administration must be granted on the estate in Spalding county. That being so, why not transfer the record there at once? When Taylor was cut off from Crawford county, a judgment in ejectment had been rendered in Crawford, but before a writ of possession issued, there was an application made to set aside the judgment, on the ground, that there was no process to the declaration. Pending the application, a motion was made to transfer the case to Taylor, the land in dispute lying in that county. It was granted, and this Court affirmed the judgment; mainly upon the ground, that if the judgment in ejectment stood, the writ of possession would have to issue and be enforced in Taylor county. We think the two cases very similar. Both were new cases, springing out of the original proceedings. And in both, the object was to set aside the judgment.

So at the last Term of Macon Court, a will was offered for probate in Sumter and caveated. The judgment of the Ordinary was appealed from to the Superior Court. In the meantime, Schley was carved out of Sumter and the contiguous counties, and took in the late residence of the testator. We held, upon writ of error, that the cause pending on the appeal was properly transferred to Schley.

It is argued, that a *scire facias* to reverse a judgment issues from the county where the judgment was rendered; and is sent to the county of the defendant's residence. True, because in that case, the defendant voluntarily removes from the county, where the judgment against him was obtained. But were he cut off into another county, by Act of the Legislature, or by operation of law, this might not be so.

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The judgment of the Ordinary is not final, but conditional. If a posthumous child born and no suitable provision is made for it, the probate is revoked; that is this case.

This right to transfer, is a question of privilege, rather than of constitutional law. And may be waived by the party. And all done, up to that time, will be adjudged to be *recte acta*. Otherwise, the most serious inconveniences would result. Hence, the Court was right in refusing to dismiss the proceedings because the county of Spalding alone and not Henry, had jurisdiction of the case.

Judgment affirmed.

BENNING J. concurring.

The substance of the facts of this case, was, I think, as follows: In 1837, Charles Knight died, in Henry county, leaving a will. In that county, the will was admitted to probate, and letters testamentary on it were granted to — Knight. He, as executor, went on to execute the will, making his returns in that county. In 1852, a motion was made in the Court of Ordinary of that county, to set aside the probate, the ground of the motion, being, that a child was born to the testator, after the execution of the will. Pending this motion, a motion was made to transfer the case to Spalding county, of which last motion, the ground was, that the part of Henry in which, the testator resided at his death, had been cut off from Henry, and made a part of Spalding. This last motion the Court granted; and its judgment was affirmed by the Superior Court.

These being the facts, the question is, whether the Court was right, in sending the case over to Spalding county? I rather think that the Court was. The case as it seems to me falls within the principle of the decision, in *Bain vs. Wimbish*, a decision made at Macon, in January, 1859.

I am not prepared to say, that I think, that the case was

one in which, the Act of the Legislature, cutting off the part of Henry, and making it a part of Spalding, did *per se*, deprive the Court in Henry of *jurisdiction*. The effect of that Act, was, however, I think, at least this much, viz: to give to any of the parties interested in the estate, the *privilege* to have the case transferred to Spalding, at their option—Consequently, I think, that if no party interested in the estate, had availed himself of this privilege, and insisted upon a transfer of the case to the new county, the subsequent acts of the Court in Henry, would have been binding.

I am in favor of affirming the judgment.

McDONALD J. dissenting.

RICHARD ROE, cas. ejector, and JOHN LEE and SAMPSON PROWELL, tenants in possession, plaintiffs in error, vs. JOHN DOE, ex dem., JOHN CATO's orphans, DANIEL CATO, ELIJAH JOHNSON, et al., defendant in error.

Where a purchaser of land, *with notice* of a prior unrecorded deed, sells to one, *without notice*, the old deed being still unrecorded, the title of the latter will be protected.—BENNING J. dissenting.

Ejectment, from Fannin county. Tried before Judge RICE, at October Term, 1858.

This was an action of ejectment brought by John Doe, upon the several demises of John Cato's orphans, Daniel Cato, Elijah Johnson, and the executor of Abel N. Dugger, deceased, against Richard Roe, casual ejector, and John Lee and Sampson Prowell, tenants in possession, for the recovery of lot of land number fifty-seven, (57), in the ninth district of

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originally Cherokee now Fannin county, containing one hundred and sixty acres.

The defendant pleaded the general issue and the statute of limitations.

Upon the trial on the appeal, the plaintiff offered and read in evidence, a grant from the State to John Cato's orphans, of Walker's district, Houston county, for the land in controversy—grant, dated May 14th, 1847. Next, a deed of conveyance from Daniel Cato to Elijah Johnson, dated 25th June, 1849. *This deed was not recorded*, and its execution was proved by one of the subscribing witnesses. Plaintiff next read such portions of the depositions of witnesses, taken by commission, as were descriptive of the said Daniel Cato, and went to identify him as the drawer of the lot in question. He proved the value of the rent, and that Lee and Prowell were in possession, under Samuel Rutherford, at the commencement of the suit, and closed.

Defendants moved for a nonsuit, on the ground, that plaintiff had failed to prove that Daniel Cato was the drawer or grantee of the land. The Court refused the motion, and defendants excepted.

Defendants then went into their defence, and introduced a deed for the lot in dispute, from Daniel Cato to George W. Slaphey, dated 19th June, 1854, and recorded 3d July, 1854; then a deed from Slaphey to Samuel Rutherford, under whom defendants hold, this deed dated 23d June, 1854, and recorded 3d July, 1854. Defendants next offered in evidence, a deed from Elijah Johnson to John Dugger, Junior, and John Dugger, Senior, executors of Abel N. Dugger, late of Autauga county, North Carolina, dated 13th March, 1850, and recorded 26th March, 1851. This deed was produced by plaintiff, in response to a notice from defendants.

Plaintiff offered testimony in rebuttal; and a great deal of evidence was introduced, which it is unnecessary to set out here.

The great—the main question in the case was, as to the

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effect of Slappey's notice of Johnson's unrecorded deed from Cato, upon the title of Rutherford, Slappey's grantee, who bought without notice of said deed, although his grantor, Slappey, had notice.

The Court below charged the jury, that when two deeds are executed by the same person, conveying the same premises to different persons, the one recorded within twelve months from the execution thereof, (if the feoffee have no notice of a prior unrecorded deed at the time of the execution of the deed to him,) shall have priority; but if, at the time of the execution of the deed, he has notice of the prior unrecorded deed, then his deed shall not have priority, but the elder deed shall prevail.

The Court further charged the jury, that if Slappey, at the time he received the deed from Cato, had notice of the deed from Cato to Elijah Johnson, then no title passed to him, Slappey, and he gained nothing by having his deed recorded in time, and the title was still in Johnson, or the Duggers, if Johnson has conveyed to them. Also, that it was not incumbent on plaintiff to prove that Samuel Rutherford had notice of Cato's deed to Johnson.

Defendants requested the Court to charge the jury, that if Rutherford bought of Slappey without notice of the deed to Johnson, he was not affected by the notice to Slappey. This the Court refused to charge.

Defendants also requested the Court to charge the jury, that as John Dugger, Senior and John Dugger, Junior, had failed to file any evidence of their being the executors of Abel N. Dugger, deceased, that plaintiff had no right to recover on the demise from them; which charge the Court declined to give.

The Court further charged the jury, that the terms "John Cato's orphans," in the grant, implied that John Cato was dead, and that it was for the jury to determine, from the evidence, what person or persons were meant and intended by the words "John Cato's orphans."

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To all of which charge and refusals to charge, defendants excepted.

The jury found for the plaintiff, and defendants tender their bill of exceptions, assigning as error the aforesaid rulings, charges and refusals to charge, excepted to.

WALKER; UNDERWOOD, for plaintiff in error.

J. R. BROWN; and MILNER, *contra*.

By the Court.—LUMPKIN J. delivering the opinion.

The only question we deem it our duty to consider and decide in this case is this: Concede that George W. Slappey bought of Daniel Cato, the orphan of John Cato, deceased, *with notice* of the prior unrecorded deed, made by Daniel Cato to Elijah Johnson, and sold to Samuel Rutherford, who had *no notice* of the conveyance to Johnson—is Rutherford protected in his purchase?

As between Johnson and Slappey, the two immediate grantees of Cato, the Act of 1837 declares, that Johnson's title shall prevail. That Act settles nothing beyond this; and such was the general decisions of our State Courts before that Act was passed. A departure from this doctrine led to the passage of this Act, as I am induced to believe from information derived from one of the old Circuit Judges. And so far as we are advised, the adjudications were equally well settled and uniform upon the other point, namely: That if A. buys land of B., and takes a deed which he fails to record in time, and B. subsequently sells the same land to C., who records his deed in time, *with notice*, and C. conveys to D. *without notice* of A's deed, and both C. and D's deeds are registered within the twelve months, that D. has priority over A.

Without citing any other authority, which is scattered broadcast over the books of reports, we rest our judgment upon the case of *Trueluck and others against Peoples and oth-*

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ers, 3 Ga. Rep. 446. That case, it is true, was not decided under the Act of 1837. But, as we have already said, the point we are discussing is not provided for by that Act. But *Trueluck against Peoples* was referred to and affirmed in *Herndon and others vs. Kimball and others*, 7 Ga. Rep. 432. And this latter decision was upon a deed made in 1839.

The facts of the case in 3d *Georgia*, were identical with the facts in this case. The learned Judge, (WARNER,) in delivering the opinion of the Court, says: "It is a settled rule, that if one affected *with notice*, conveys to one *without notice*, the latter shall be protected equally as if no notice ever existed. So, where one *without notice*, conveys to one *with notice*, the purchaser *with notice* will be protected; for otherwise, a *bona fide* purchaser might be deprived of the benefit of selling his property for its full value." And this rule is sustained by innumerable precedents.

And it occurs to me, that it is founded in reason. If the second grantee, from the same vendor who buys, acquires the priority over the old unrecorded deed, why should not the vendee of the second grantee, who purchases without notice, be equally protected? If the *laches* of the first grantee, in not having his deed recorded in time, is made the reason for giving precedence to the second purchaser, *without notice*, does it not operate with equal force in favor of the innocent purchaser *without notice*, from the second grantee *with notice*? It is by the same *laches* that this second purchaser is enabled to perpetrate a fraud upon his innocent vendee.

It is said that he may resort to his warranty, and thus cause the loss to fall upon the right person. The same argument would apply as between the two original grantees from the same vendor. And yet the Legislature has not deemed that a satisfactory reason; and hence passed the Act of 1837. A warranty is not always given; and the warrantor may be irresponsible. Moreover, it is not disputed but that there are a class of cases, where this principle does ob-

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tain. Why should it prevail in any case, if the foregoing reply is satisfactory? Neither law nor equity ever looks beyond an innocent purchaser, but spreads its broad ægis over him.

Again, it is contended that this doctrine is illogical. For, say counsel, if the first purchaser *with notice* takes nothing, how can he convey a title to a *bona fide* vendee? When A. sells in fee to B., has he any thing left? And yet it is yielded, for the statute so declares, that if B. fails to record in time, A. may subsequently sell the same land to C. The right, in both cases, depends upon the law which may regulate the rights of the parties, as to justice shall seem proper.

But I forbear to elaborate any further. Such being the settled rule in this State, and out of it, prior to the passage of the Act of 1837, (which, so far from discountenancing, rather favors the doctrine, by inference at least, for which we are contending;) and of this Court since the *unanimous* decision of this Court in *Trueluck's* case, in 1847; and the General Assembly, with full knowledge of the old law, not having seen fit to disturb it, we think it best to adhere to the practice, however ingenious and plausible the argument submitted to the contrary, until changed by statute to operate prospectively. To overrule all past adjudications, whether ill or well founded, whether with or without sufficient authority, and establish a contrary rule, would be to overthrow a vast number of land titles in this State. No Court ought to do this.

Judgment reversed.

McDONALD J. concurred.

BENNING J. dissenting.

Cato was the drawer of the land. He made a deed for it to Johnson; afterwards, he made a second deed for it to Slappey, but giving Slappey notice of the first deed. Slap-

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pey, afterwards, made a deed for the land, to Rutherford who, it is to be presumed, *pro hac vice*, received the deed, without notice of the deed to Johnson. The deed to Johnson, was not recorded within twelve months from its date; the other two deeds were recorded within twelve months from their respective dates.

These were the facts. And the question is, which had the title, Johnson or Rutherford?

The decision of the Court below was, that Johnson had the title; and that decision was, I think, right.

If Rutherford had the title, he must have acquired it from Slaphey. But, he could not have acquired it from Slaphey. That is forbidden by a rule of the common law, and also, by a statute; and there is nothing to gainsay the rule, or the statute.

What rule? The rule, that he who has no title himself, can convey none, to another. Slaphey had no title himself; he purchased from Cato, a person who had no title, he having parted with the title to Johnson, and purchased with notice of that fact. Therefore Slaphey had no title himself; and he having no title, the common law rule says, that he could convey none to Rutherford.

What statute? The Registry Act of 1837. A part of the fourth section of that Act is as follows: "In all cases where two or more deeds shall, hereafter, be executed by the same person, or persons, the one recorded within twelve months from the time of execution, (if the feoffee have no notice of a prior deed unrecorded at the time of the execution to him or her,) shall have preference." These words say, by implication, that if this feoffee *do* have notice of a prior deed unrecorded, at the time of the execution of the deed to him or her, the *prior deed*, and not his, should have the preference. That the words say this, by implication, I suppose, I may assume.

Slaphey, at the time of the execution of the deed to him, had notice of the prior unrecorded deed to Johnson. There-

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fore, by the implication in the statute, that deed had the preference over his. But to let his deed convey the title to Rutherford, would be to give his deed a preference over that deed. It is true, then, that the statute forbids, that Rutherford should have acquired title from Slaphey.

Is there anything to gainsay this double inhibition; an inhibition of both the common law and a statute. It was argued, that there were two things to do so; the one, the spirit of this same statute; the other, a *decision of this Court.*

As to the former, I say first, that, if the letter of a statute is plain, we are not at liberty to leave the letter, for what, we may fancy to be the spirit, unless sticking to the letter would lead to some very bad consequences. This, I dare say, will be conceded. Here, the letter, though, to be implied, is plain. That the statute means to say, by implication, that the first deed shall have the preference over the second, if the taker of the second, have notice of the first, none will deny. And sticking to this, as the letter, would not lead to any very bad consequences. The effect of doing so, would be, to give to Johnson, the land; to Rutherford, damages for the breach of Slaphey's warranty to him; for it is to be presumed, that he has a warranty from Slaphey. That is to say, the effect would be, to put the loss on Slaphey, the very person who ought to bear it, for it is he that is the guilty party; it is he that bought with notice of the prior deed. Sticking to the letter then, would, by putting the loss on the right party, lead to good, instead of, to evil, consequences; not sticking to it, but following the supposed spirit, and giving the land to Rutherford, would be, to transfer the loss from his warrantor, Slaphey, a guilty party, to Johnson, an innocent party. This being so, it follows, from the principle assumed, that we ought not to depart from the letter of the Act, to follow the supposed spirit of it.

Secondly: It is by no means clear, that the case of Rutherford, is within even the spirit of the Act. What is the

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spirit of the Act? Is it, that he who buys by the record, shall be protected by the record? So broad as that, it can not be, I say. There are some cases in which, he who buys by the record, will yet, not be protected by the record; as the case in which, he takes a second deed, without notice of the first, and before the first has been recorded, but takes it before the time for recording, the first, has expired, and, subsequently, but within what remains of that time, the first is recorded; secondly, the case in which, the deed the record of which, he follows, is, a forgery; thirdly, the case in which, the deed, the record of which, he follows, is one that was never delivered. In none of these three cases, does the purchaser acquire any thing, although, in each, he follows the indication of the record, as to where the title is. And we may well argue, that cases analogous to any of these ought to keep company with these, and share their fate. The case in hand, is analogous to the last two of these. It is a case in which, one of the deeds on record was a *void* deed; the deed from Cato to Slaphey. That deed was void, because Cato had previously conveyed all his interest in the land, to Johnson, and Slaphey, when he took that deed, knew that Cato had.

The two cases referred to, are also cases in which, a deed on record is, void. True, in them, the deed is void for a different reason; in the one, for being a forgery; in the other, for never having been delivered. But what of that? It is the effect that is material, and not the cause, and the effect is the same in each of the three cases, namely, that the deed in each is void.

Then there is analogy between the case in hand, and these two cases of the forgery and the non-delivery of the recorded deed. It is also true, that it must be admitted that there is analogy between the case in hand, and a case which is certainly within the Act. Suppose Slaphey had bought from Cato, without notice of Cato's previous sale to Johnson, and had recorded his deed in twelve months from its date. In that case, Slaphey would have got the title over Johnson, and

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yet it would be true, that he would have got it, from a man who had no title himself—Cato having previously parted with all his title to Johnson. The Act would, by its express words, cover this case. The question, then, is, which would be the more conformable to the spirit of the Act, that the case in hand should be made to keep company with this case, or that it should be made to keep company with the other two cases. That is a question to which, there are two sides. And if that is so, then, the case ought to be made to keep company with those two cases—seeing, that to make it do so, would be to follow both the letter of the Act, and the rule of the common law. What these are, we have seen.

I say, then, that it is true, that this is a case in which we are not at liberty, to leave the letter of the Act, to follow what we may imagine to be the spirit of it, because, first it is plain what the letter is; and, secondly, is not plain, but that the spirit goes with the letter.

But is there not a decision adverse to this conclusion—the decision in *Trueluck vs. Peoples, 3 Kelly.*

I say no, and, for two reasons:

First, that decision was not made on this Act of 1837, but, on the previous registry Acts—and not one of those Acts contain a provision similar to the provision in this Act of 1837. The Act of 1767, contains a different—an opposite provision to that and one expressed in the strongest language. The provision in this Act of 1837, is, that if the second purchaser have notice of the previous purchase, that purchase shall have the preference over his, although the deed in that previous purchase, may not have been recorded within the prescribed time, and his deed may have been recorded within the prescribed time. The provision in the Act of 1767, prescribes a time within which it says that all deeds must be recorded ; it then uses these words : “ In failure of which, all such as are lawfully and regularly registered as aforesaid, shall be deemed, taken, and construed, to be prior, and shall take place, and be recoverable, before any and every deed,

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conveyance, or mortgage, which has not been lawfully registered as above." *Prince*, 158. This is a provision, on the very letter of which, *Trueluck and Peoples* can well stand. In that case, the first deed was not recorded in the prescribed time—the second was, and when that is so, the statute says that the second shall have the preference, and it does not say that this preference shall depend on whether the second purchaser has, or has not notice of the first purchase. Altogether different is the letter of the Act of 1837.

Again, the decision in *Trueluck vs. Peoples*, is put on the equity principle, that a purchaser of the legal title, without notice of the equitable title from a purchaser with notice of that title, gets the whole title, both legal and equitable. This principle, I do not deny; but, I may remark, that if it is now an established one, its establishment has been, not without dissent and opposition. But, in my opinion, the case was not one in which the principle could apply. The cases in which that principle applies, are cases in which, the purchaser acquires *the legal title*. The rule is founded on another equity rule; namely, the rule that where the equities are equal, the legal title shall prevail. The equity of a purchaser without notice, must be equal to the equity of any other claimant whatever, for he parts with his money, and does so, without fault in himself. He has the legal title; and, thus, he stands one point ahead of every other claimant whatever. Consequently, he must be able to prevail over all competitors. The case in which, this principle applies, happens when A. holding property in trust for B. sells it to C., with notice of the trust, and C. sells it to D. without notice of the trust. Here C. acquired the legal title, although, he purchased with notice of the trust; consequently he can, and does transmit that title to D., who thereby becomes the holder of the legal title, without notice of the trust. But, in the *Trueluck case*, the purchaser without notice, *never acquired the legal title*. Purchasing from one who purchased with notice of the trust, he purchased from one who had

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no title of any sort to convey ; and therefore, he could not have acquired the legal title. Of course, this is said on the supposition that the registry Acts are to be laid out of the question, and that the case is to be considered as one governed by the common law, and the principles of equity. That is the way in which, it seems to have been considered by the Court deciding it. The *Trueluck case*, then, was, I say, put on a principle that does not apply to such a case, as it was. And the point, whether that principle did or did not, apply to the case, was not, as far as appears, before the Court. It seems to have been assumed, on all hands, as a matter of course, that the principle did apply to the case. The attention of the Court not having been drawn to the point, the decision would be worth little as a precedent on the point, even if it were true, that the decision were not on a different statute from that, involved in the present case.

For these reasons, I dissent from the judgment of the Court.

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126 788 JOHN COBB, junior, plaintiff in error, vs. THE STATE OF
GEORGIA, defendant in error.

- [1.] It was not error for the presiding Judge to advise the Sheriff to cause the Constables of the county to summon a large number of persons qualified to serve as jurors, living in remote parts of the county, to attend at the Court House on the day appointed for the trial, that tales jurors might be summoned with convenience.
- [2.] It is not error for the Court to allow the testimony of witnesses taken down in writing to be read over to them in the presence of the jury, for the purpose of correcting errors which may have been committed, in writing it down.
- [3.] A letter addressed to and read by or to a defendant on his trial, to which he makes a verbal reply, may be read in evidence to enable the jury to understand the reply, but not as evidence of itself.

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- [4.] That a verbal reply to a written request made in a letter, was made in the Penitentiary to the principal keeper thereof, constitutes no objection in law to its admissibility in evidence against the party making it, if voluntarily made, and drawn out by the exercise of no improper influence.
 - [5.] When a defendant, who is jointly indicted with another for murder, who has pleaded guilty to the charge, is appealed to by that other, who must know his guilt, if guilty, to confess the crime, and he simply refuses to confess, but does not deny his guilt, the circumstances may be given in evidence to the jury.
 - [6.] The Supreme Court will not control the presiding Judge in the Court below, who heard the evidence and tried the cause, in deciding how far the remarks of counsel are warranted by the evidence before the jury, when it is not clear that they were unwarranted.
 - [7.] Witness may answer whether an instrument which he has heard described, but has never before seen, answers the description given, or is the same instrument, and if he make an improbable statement, it may be made the subject of comment before the jury.
 - [8.] No error in the charge of the Court to the jury that one positive witness, is to be believed, rather than many negative witnesses to the same point. It does not differ from the legal principle, that the existence of a fact testified to by one positive witness is rather to be believed, than that such fact did not exist, because many witnesses who had the same opportunity of observation swear that they did not see or know of its having transpired.

Murder, in Fulton Superior Court. Tried before Judge BULL, at October Term, 1858.

The following is the bill of exceptions, upon which this case was heard, and which with the opinion delivered by the Court, contains all the facts necessary to a full understanding of the points adjudicated.

GEORGIA, Fulton County:

Be it remembered, That during the October Term, eighteen hundred and fifty-eight, of the Superior Court of said county, his Honor, ORVILLE A. BULL, Judge of said Court presiding, the case of the State of Georgia vs. John Cobb, jr., being an indictment for murder, was called, and with consent of parties, set down for trial on a given future day in said term; after which his Honor, the presiding Judge, advised the Sheriff to cause the different constables of the

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county to summon a large number of persons, qualified to serve as jurors, living outside of the city of Atlanta, and in remote parts of the county, and have them at the court-house on the day appointed, in order that a jury might be had, which the Court thought otherwise impossible. This suggestion was given to the Sheriff, and notice of it was not communicated by the presiding Judge to the defendant, or his counsel, in time to enable them to urge it as a cause of challenge, because the Court had no doubt, and has none now, that the counsel knew it at the time the jury were empanneled. When the day of trial arrived, many of the persons so summoned by the constables, being in attendance under the above named order, were put upon the defendant as tales jurors, though not until after having been selected as such from among the by-standers, by the Sheriff, under the usual order from the Court, given at the time, directing him to take whom he pleased from the by-standers at large: and the panel was made up from the by-standers at large. To this mode of bringing in, summoning and selecting said tales jurors, and to the first above mentioned order and instructions of the Judge to the Sheriff, and through him to the Constables, the defendant excepts and assigns the same for error. No objection being intimated at the time of empanneling the jury, and no evidence offered afterwards that the defendant and his counsel did not know a fact so notorious.

From said tales jurors and others, and from the regular panels, a jury was impanneled and sworn to try the prisoner, when the following evidence was introduced, under the circumstances, and objections hereinafter detailed, to-wit:

The State first introduced *James Hill*, who being duly sworn, testified as follows: He was coming up the McDonough road about three miles from the Court-house, Mr. Little and Mr. Gammion hailed to witness and said, there was a man in a bad fix: witness got out of his wagon, went down to the body of the man; tried to get him to speak but he could not; made an effort to do so; left him; then came on

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back to the road, making search if they could find any weapons. In doing so, saw where he had been dragged over leaves and bushes and a couple of poles ; got to the edge of the road, a little boy was with them. The boy was looking about, saw a leather string ; caught hold of it ; pulled it up out of the leaves ; a slung-shot was fastened to it. Witness took hold of the ball and looked at it ; handed it to some other person. Told Mr. Little and Mr. Gammon to remain there ; W. came on to town after the coroner and physician. This was on the 8th day of April, 1858, in the county of Fulton ; the body was 30 steps from the slung-shot and near the track where the body was dragged ; did not examine the slung-shot very particularly ; thinks he would know it if he were to see it ; the one exhibited in Court is the one found there on that day. The condition of the deceased was very bloody ; his mouth was full of blood ; his head was very bloody ; saw a vehicle thereabouts next day on the opposite side of the road—one horse—no animal to it. It had formerly had a top to it, which was sawn off ; did not know the deceased ; his age was about sixty years ; had on home-made, woolen clothes ; the deceased lived from Thursday evening until Monday morning ; it was between four and six o'clock ; W. went to the place where deceased was ; the vehicle was a carry-all and about a hundred yards distant from the road. This was on the McDonough road, you go out McDonough street to get in said road. Mr. Little's brick-yard is on the right hand side of the road ; it is on a direct route to the place where deceased was found. The brick-yard is about a mile from town. This brick-yard is two and a half miles from the place where deceased was found. Geo. W. Mobb's house is on the road you go from Atlanta to the scene of the killing. His house is about a mile from the place where deceased was found.

The State next introduced *Josiah Gammon*, who being duly sworn, testified as follows : Witness and his wife were in town ; started home, and as they went on saw Mr. Little,

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he and a negro man about starting down the road; W. and wife stopped a while and went on with them; got down to witness's house. Hutchins, Little and W. went on down the road to where deceased was; when they got there he was lying on his side rather; saw Mr. Hill and his wife coming up the road; said to him there was a man in a bad fix. Mr. Casey and family came up; they were looking around; Mr. Casey's little boy picked up a slung-shot; said, what is this? The parties present concluded to send Mr. Hill on to town after the coroner and doctor; soon after he left, several came up. Mr. Garrison sent to the house, got some rags and water and washed the dry blood out of deceased's mouth. He was moved to the house of Mr. Aaron Garrison. It was on the 8th day of April, 1858, on Thursday evening; thinks the sun was about one and a half hours high; it was in the county of Fulton. The slung-shot was found about twenty-five or thirty steps from the body of deceased; thinks he would know the slung-shot if he were to see it; thinks the one exhibited in Court is the same one found near the body of deceased. It was about twenty-five or thirty steps from the road where they found deceased. The slung-shot was found near the road-side and near the place where it was found, was some blood found on the leaves; knows where the brick-yard is, near Mr. Little's. There is a house between the brick-yard and Mr. Little's; some one was living in it at the time. These points are all on the McDonough road; you go out McDonough street to get into said road in going out from town.

Cross-Examined.—It may be nearly one-fourth of a mile from where W. and Little left the negro, to where deceased was found. It was woods all the way down from the road to where they found deceased; did not see the negro after leaving him until nearly dark. From the time the negro left witness until Hutchins told him of the condition of deceased, was about thirty minutes; the negro was going in the direction where the body was found; it was a negro man; thinks

it was about two miles from the brick-yard to where the body was found. W. thinks widow Cole lived in the house between the brick-yard and Mobb's; thinks it was about a mile from Mobb's to where the body was found. The negro was on his way for wood at the time W. left him.

The State next introduced *Lawrence Hutchins*, who, being duly sworn, testified as follows: Joseph Gammon, Mr. Little and W. were together when they found the body. Mr. Little's black man first told W. about the body. Mr. Little, Gammon and W. went to the place where the body was; the body was about twenty-five or thirty steps from the road; was not acquainted with him; he was badly hurt; did not see any carriage about there that day or the next; saw a slung-shot; was not there when it was found.

Cross-Examined.—Witness was about a half mile from where the body was found.

The State next introduced *Dr. Willis F. Westmoreland*, who, being duly sworn, testified as follows: He was the physician who attended Mr. Landrum; saw him first in the road near where he was murdered; saw him next at Mr. Garrison's; saw many wounds upon him; had several wounds upon the head, some eight or ten; his skull was fractured; broken probably into twenty pieces; he was able to speak when W. saw him, but was not rational; he lived from Thursday evening until Monday morning after. Blows upon the head caused his death. He died at Mr. Garrison's, in this county; was first called to him on Thursday, somewhere about 1st of April, 1858; sometimes he would speak and give his right name and then some other. He was not rational; was not acquainted with him before. The wounds were inflicted with a blunt instrument; one of the wounds seemed to be bruised; inflicted with an instrument, bruising with contusion around it; the other was lacerated—torn. (The slung-shot was here presented.) Thinks it would cause such wounds; a number of the wounds must have been inflicted with a round instrument, breaking the skin only in

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one place in the center and contusion immediately around; saw the deceased's coat; it was a short coat with pockets in the side; thinks it was a sack made of yellow or brown jeans; no other garments W. can describe. W. got to the wounded man after dark; the blood was dry on his clothing; thinks it would require several hours to dry as it was.

Cross-Examined.—Thinks he left town about deep dusk to go out; the deceased gave his name several times Samuel Landrum; could not say from the condition the deceased was in when he saw him, when he was wounded.

The State next introduced *Silas B. Kent*, who being duly sworn, testified as follows: He is acquainted with John Cobb, jr.; Witness was working at Mr. Williams's brickyard 1st of April, 1858. It is outside of the incorporation on McDonough road; was working there the time Mr. Landrum was killed; heard of his death the day after it happened. The day the killing took place witness was working at the same place; saw on the day of the killing the gentleman that got killed pass in a little carry-all and then saw Mr. Jones, Mr. Cobb and another man pass; did not know the other man at the time; has since found out it was Mr. Crockett. The vehicle in which the old man was riding had one mule to it; it did not have any top; did not notice it particularly; did not notice the man in it much; saw them all when they crossed the branch; the man in the buggy was ahead; Cobb and Jones and the other man were not right up with the old man—close behind; this was between ten and eleven o'clock. W. has known Cobb and Jones about five years; did not know Crockett at the time; saw him several times since, here in jail and when he was executed; W. is positive Cobb and Jones were following the old man in the carry-all at the time mentioned. When W. alludes to John Cobb, he means young John Cobb. (Witness here pointed out the defendant in the court-house.) They were going down McDonough road when W. saw them; saw them about two hundred yards before they got out of sight. When W. last saw them

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they were going down McDonough road. Two of the Mr. Helton's, Mr. Cox, Mr. Archibald Brown and Mr. Williams were at the brickyard the time W. was at work there; says he sees Mr. Jones in the court-house—points him out. When W. last saw Cobb and Jones and this other man, they were still together.

Cross Examined.—Says he is eighteen years of age: it was about fifty yards from McDonough road to where they were at work; was doing regular work when parties passed—pitching brick; does not remember any other persons that passed the day of the killing; recollects seeing some ladies pass—the Misses Robinson; Mr. Brown said he thought he knew the old man in the carry-all; never noticed particular the third person with Jones and Cobb; thought Cockett was the man from his looks afterwards; if W. had seen them all three together, he thinks he would have known Crockett; saw them all three together in the court-house last Court; does not know how many days it was after Cobb, Jones and this other man passed the brick-yard before he heard of the murder; does not recollect to have seen them pass at any other time than the one he mentions; thinks it was in March he saw them pass—about the last of March; it was not a common buggy—sorter of wagon. The parties, Jones and Cobb, were about 25 or 30 yards behind the wagon. Nothing happened to fix it upon witness' mind that it was ten or eleven o'clock when they passed.

Re-examined by the State.—When the men passed, there was something said about knowing them—that called his attention; knows it was before dinner they passed; about an hour or an hour and a half; does not know when he heard of the killing; thinks it was on Wednesday; does not know the day of the month or week; does not think the Superior Court was sitting at the time he saw them pass; thinks he heard of the killing about the middle of this year; it was the day after he saw them pass the brick-yard he heard of the killing; heard of the killing the day after it happened; never saw

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Cobb and Jones and Crockett pass at any other time than the one he testifies to; heard of it the next day after he was found; heard of it from some young men who went from brick-yard to see him; does not know how long it was after Jones and Cobb passed; don't know who told him; don't know what time of day it was; some person had stopped at the brick-yard and told them of it—before the hands went to see him.

The State next introduced *John H. Helton*, who being duly sworn, testified as follows: He was working the early part of this year on McDonough road, making brick at Mr. Williams' brick-yard; saw Gabriel Jones and John Cobb pass by said yard; young Kent was working there; one of the boys saw them passing, spoke of it and called W's attention to them. Saw three women pass the same day. If he saw a man pass in a vehicle does not recollect it; thinks it was the 8th of April, 1858. This all took place somewhere between 8 and 11 o'clock, A. M.; did not see Cobb and Jones come back by brick-yard. Witness worked there a little over a month; saw Cobb and Jones out at the brick-yard once before; stayed there a while and came back to town; saw Jones and Cobb pass out on the 8th day of April, 1858: saw the body of deceased on the 9th of April.

Cross-Examined.—He was summoned to go before the Coroner's jury on the 11th or 12th of April, 1858; that was the time he first commenced thinking it was the 8th of April, 1858, Cobb and Jones passed; thinks he is positive it was the 8th of April, 1858; he recollects back when he was called before the coroner, and that makes him remember the date. Mr. Kent was hauling brick in a wheel-barrow; when he would go after a load he would be about 20 yards from witness; were all busy at work in brick-yard; Hamilton Davis, and two of the Cox's were at work in the yard; Mr. Williams might have been there in the morning; was not there when these men, Cobb and Jones passed; Archibald Brown was there; women were ahead of Cobb and Jones; about

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ten minutes ahead ; looked at Cobb and Jones ; and did not see any person with them ; W. just threw his eyes out, saw them ; was busy at work ; a wagon might have passed in fifty yards of these men and W. not see it, as he was busy at work. The time Cobb and Jones came out to the brick-yard before, they stayed two or three hours. Witness was kilning brick at the time of the passing on the 8th day of April, 1858. Witness was sitting on kiln, catching brick ; the boys bringing brick to him had a better chance to see any one passing than W. ; W's mind was first called to the fact of Cobb and Jones passing the next day after the murder ; thinks it was on Thursday they passed. When W. saw Jones and Cobb pass he just threw his eyes upon them and took them off again.

The State next introduced *James B. Lofton*, who, being duly sworn, testified as follows: He had a slight acquaintance with Samuel Landrum ; saw him on the morning before he was said to be killed ; he had on an old white hat, inclined to be smoked ; inquired the way to Mr. Almond's—Mr. Asmos Almond's ; did not notice his coat particularly ; thinks it was a striped, greenish color—is not positive what the color was ; did not see his vehicle ; told W. he had a buggy ; thinks the time he saw him in town was between 10 and eleven o'clock ; thinks Landrum was about 60 or 65 years of age ; saw him when he was dying, and was the same man who told W. in town his name was Samuel Landrum. You take the McDonough road and go it about six miles to turn to the right to go to Almond's. There is a brick-yard on the way ; Mr. Little also lives on the way ; Gammon also lives on the route to Almond's ; pass Mr. Little's first, then cross a creek ; the brick-yard is next ; next house is Mr. Mobb's ; next place is Mr. Gammon's house. Does not think there is any other house between that and the scene of the murder ; thinks it is between half a mile and a mile from Mobb's house to the scene of murder ; did not see the deceased start out of town.

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Cross-Examined.—Witness had never seen deceased before the day he was killed; thinks he might have been with him an hour, or less than an hour; thinks the pockets in his coat were in the side.

The State next introduced *A. R. Almond*, who, being duly sworn testified as follows: He is acquainted with Samuel B. Landrum; knew him in Alabama. The last time he saw him was at the house of Aaron Garrison; he was awfully mangled; died at his house in Fulton county; it was three and a fourth miles to where he was killed from the courthouse; he knew the deceased well; had dealings with him. It was the early part of April, 1858, he saw him at the house of Aaron Garrison; he had on a dingy, white hat—was fur; thinks he was fifty or sixty years of age; nearer sixty than fifty; saw his coat; has seen it on the deceased in Alabama; it was a dark grey; did not notice where the pockets were; did not see him in town before he started out.

The State next introduced *Stephen Cox*, who, being duly sworn, testified as follows: Was working at the brick-yard of Mr. Williams' on McDonough road in the early part of April last; saw Mr. Cobb pass there when he was at work there; does not know Cobb and Jones; remembers the time Mr. Landrum was killed, that is, remembers hearing of it; heard of it about the 10th day of April last; saw three young men and an old man pass the brick-yard on the 8th day of April; it was after dinner time; never saw Crockett to know him. The four men he saw pass were going towards the mill on the McDonough road; saw a carry-all among them; had two seats in it; had one mule hitched to it; had no top to it. There was one man in it, an old looking man; had on a high white hat; brim was mashed down; the other three men were walking along side of the wagon; saw them when they crossed the branch; stopped at the branch until the mule drank; saw a man take down the bridle reins until the mule drank; saw three women pass about half an hour be-

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fore these men went on; did not see the women come back.

Cross-Examined.—Witness worked at the brick-yard^{all} last summer; had worked there about a month before he saw these men pass; had never seen the men he saw pass before in his life; had never seen Cobb and Jones before he saw them pass on the 8th of April, if it were them. Two young men came there sometime before and stayed about half an hour; was there every day Mr. Helton was there; has never seen the two young men, that stayed at the brick-yard about half an hour, since; does not recollect of any other two young men coming to the brick-yard while he and Helton were there; does not know it was the 8th of April he saw them pass; does not know the day of the week; it was about two o'clock he saw them pass. Mr. Helton, Mr. Brown, witness, Mr. Kent and a brother of W. were there; W. was rolling brick to the kiln; was about ten yards from the road. Kent was at the same business as W.; Kent pitched up some of the brick, and W. some; Kent was pitching when they passed. W. and Kent were near the same place. The young men were walking side of the wagon when W. first saw them; they were on this side of the brick-yard about one hundred yards; all came on down the hill together; the boys were talking to the man in the carriage; W. did not stop work; saw them all the way down to the creek; creek is this side of brick-yard. The young men crossed the creek on a foot-log; the old man crossed in his carriage. Mr. Helton said it was Mr. Crockett that let down the bridle for the mule to drink; told him so the day they passed; it was John Helton—and W. is not mistaken about this. Has not read Crockett's confession—heard no person read it. After they crossed the branch, the young men still walked by the side of the wagon; saw them about one hundred and fifty yards from the branch to where they went out of sight; was at work all the time; saw them all the time, from the time they came in sight until they went out; they were not up with the

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carriage when he first saw them; they were not as much as five or six steps behind the carriage—he is certain of this. The young men walked on the same side of the carriage as far as W. could see them; went after brick while these people were passing; went more than once. In going after brick, he went from the public road. W. is perfectly certain he had eaten dinner when they all passed; is certain he is not mistaken about this matter; finds it is easy to be mistaken about things of this sort; is certain the women passed after dinner. Mr. Williams was in the habit of going to the brick yard every morning. The men passed the brick-yard on Thursday, and witness heard of the killing on Saturday. Does not know how long after the murder occurred until he heard it. Swore a while ago that he did not know what day of the week these men passed; it just comes to his mind now the reason he now knows; heard Mr. Little's negro man tell the boys at the brick-yard the next day after the killing, about a man being killed. It was on Saturday the negro told about it at the brick-yard; there was nothing said about it the next day after the killing; all hands worked at the brick-yard the next day after the killing. He is positive as to the above statements.

The State next introduced *Robert Helton*, who, being duly sworn, testified as follows: He was working in the brick-yard of Mr. Williams the early part of April last; heard of the killing about that time; was working in the brick-yard at the time; thinks he heard of the killing the next evening after it was done. The day on which it happened, saw three men and three women pass the yard; saw an old man, with a white hat on, pass in a carriage; had a mule to it; had no top to it; the man in the carriage looked like an old man; the three men were one hundred and fifty yards behind the carriage; they were behind the carriage going out from town; saw them first after they passed the brick kiln. After they crossed the creek they were about fifty yards or more from witness, when he first saw them; did not know

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them ; it was next evening he heard of the murder ; can see a right smart piece each way from the brick-yard ; hill on each side ; you can see them farthest going from town. It was about 10 or 11 o'clock when they passed ; it was before dinner ; has not seen the three men since to know them ; two Heltons, two Coxes, Hamilton, Kent and Davis saw them just as they passed the brick-yard ; thinks the three men were about fifty yards from the man in the wagon, when witness saw them ; the women were between the men and the wagon when witness saw them ; the old man had on a white hat.

Cross-Examined.—Witness had been working at the brick-yard a month or so before he saw them pass ; his employment on the day was first one thing and then another ; was rolling a wheelbarrow at the time they passed ; witness, Cox and Kent were at the same work when they passed ; was positive it was before dinner they passed. When witness first saw the wagon, it was past the brick kiln ; the women were between the men and the wagon ; the women were about thirty yards behind the wagon—the men about fifty yards ; the creek is not fifty yards from the brick-yard ; the creek is on this side of the brick-yard ; there is no creek or branch in sight after they pass the brick-yard ; thinks the wagon could go a quarter of a mile beyond the brick-yard before it got plumb out of sight ; the boys were all busy at work ; thinks he heard of the murder the same time John Helton heard it ; thinks he was at the brick-yard when he heard of the killing ; it had rained, he thinks, after the young men passed, before he heard of the murder ; he was sometimes absent from the yard ; did not know the women who passed ; it is a public road—the McDonough road.

The State next introduced *McDonald Davis*, who, being duly sworn, testified as follows: Witness was working in Mr. Williams' brick-yard in early part of April last ; was bearing off brick ; heard of some one being killed out there about that time. Thinks heard of it on Monday after it hap-

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pened; thinks it was four or five days before he heard of the killing; is acquainted with Cobb and Jones; has known them about four years; does not know Crockett; Jones and another man who they said was Crocket, came to the brick-yard about a week before; saw Jones and Cobb going out the McDonough road, and another man who looked just like the man they said was Crockett; this was on Wednesday or Thursday. Witness thinks they passed between eleven and twelve o'clock; does not remember seeing any one pass in a carriage; saw, about fifteen minutes before Cobb and Jones passed, three women pass; does not know them; it was before witness saw them pass that he saw Jones and a man they called Crockett, about a week before, when he saw them at the brick-yard; saw the three men along the road some two or three hundred yards; did not see them until they crossed the branch; there is a hill the other side of the brick-yard; saw them to the top of it; the women were ahead of the three men; thinks it was Wednesday or Thursday; heard of the murder the first of the next week; thinks it was Monday; saw Crockett when he was hung; saw him well; thinks he was the same man he saw with Jones at the brick-yard.

Cross-Examined.—Had been at work at the brick-yard as much as two weeks; Jones was at the brick-yard only once, and then a man was with him who they said was Crockett; when they passed, he knew the man with Cobb and Jones was the same man he saw out there with Jones; was with them. If Jones had been at the brick-yard more than once, witness had not seen him, and he worked there all the time. Bud Hamilton, Benjamin Bowen and witness were bearing brick; witness was about 20 or 30 steps from McDonough road; the women had gone out of sight before the men came along; had been gone ten or fifteen minutes; thinks it is about two or three hundred yards from brick-yard to where they went out of sight; did not see any wagon or carriage pass about that time; all the hands stop-

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ped and looked at them when they were passing ; there were three women ; did not see the women come back ; went on at work there ; worked every day the next week that any one could work ; first heard of murder at home, then at the brick-yard ; when witness heard of it deceased was not dead.

The State next introduced *Mrs. Elizabeth Brown*, who, being duly sworn, testified as follows : Heard of a man being killed on McDonough road last Spring ; remembers seeing a middle aged man pass in a wagon, a mule hitched to it ; was very ordinarily dressed ; had on an old white fur hat ; looked as though he was between forty-five and fifty years of age ; he inquired the way of witness to Mr. Almond's ; this was on Thursday ; does not know the day of the month ; heard of his being killed, the next day ; witness's house is on McDonough street, just out of the incorporation ; witness's house is between a half and three-quarters of a mile from Williams's brick-yard ; it was not far from 11 or 12 o'clock when she saw him pass ; he had on a sort of a brown jeans coat ; the old man went on the McDonough road.

The State next introduced *J. P. Knight*, who being duly sworn, testified as follows : Heard of a man being killed last Spring ; does not know the day of the month ; it was the first of April last ; thinks he heard of it on Saturday first after the killing ; saw a man on Thursday passing out in a vehicle ; thinks it was somewhere about 11 or 12 o'clock ; he was going to Mr. Almond's, deceased said ; his wagon was a four-wheeled concern ; it was what you might call a carry-all, with the top off ; it was drawn by a mule ; witness thinks by a sorrel mule ; he had on an old white hat—saw him on McDonough street ; he was an old man, about 40 or 50 years of age ; saw the man who was killed ; was the same man ; it was right at Arche Brown's door witness saw the old man when he was going out.

The State next introduced *George W. Mobbs*, who, being duly sworn, testified as follows : He heard of a man being killed the 8th day of April last ; saw the man ; was at home

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in the first part of the day ; saw three men coming by ; one had a gun ; fired it off; went to work in the blacksmith shop about 11 o'clock ; was watching out for Mr. Meredith Brown ; heard a carriage passing or coming from out of town ; stepped to the door to see if it was Brown ; saw a gentleman passing in a kind of Jersey concern ; saw it was a single man riding in it ; went back to work and heard another coming ; went to the door again ; carriage passing ; two men in it ; they passed by ; the mule in a trot ; turned back to the fire place and discovered two men against a pile of lumber near witness's house, all going down towards McDonough ; when witness saw the two men, thought one was Meredith Brown ; he was stoop shouldered sorter ; there was a man with him near a head taller than he was, and a good deal larger. This was about half past eleven o'clock, just before dinner ; my house is something near a mile from Williams's brick-yard, on the other side from town ; the first carriage passed had only one person in it ; it was about 15 or 20 minutes from the passage of the first carriage to the second carriage ; there were two persons in the second ; it was a Jersey concern, and had no top ; had one mule to each wagon passed ; it was long enough for a man to walk 15 or 20 steps from the time he saw the second carriage pass until he saw the two men on foot pass ; three women came by between the first and second wagon—inquired the way to Benjamin Thurmond's ; they were the Miss Robersons ; the women had passed about long enough to walk a hundred and fifty or two hundred yards ; did not notice the tallest man's clothes ; dressed in dark clothing. If he ever saw Crockett it was on that day ; he noticed, as he passed, his head pitched forward and his shoulders seemed to be higher than usual ; can't say whether he believes it was Crockett ; the make of the shoulders and the head pitching forward, is all that makes him think it was Crockett he saw that day ; knows where the body of Landrum, the deceased was found ; it was three-

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fourths of a mile from witness's house on the road to Almond's.

Cross-Examined.—It was 25 or 30 minutes from the time the first three young men passed until the first carriage passed; one of the carriages was a blue one and the other a black one; the blue one was ahead; there was a plain fork in the road, leading to Rough and Ready, the other side of witness's house; soon after he saw the second carriage pass, he saw two gentlemen pass; one was Mr. Ed. Webb; he lives here in town; saw the carriage found near the deceased; it was a carriage fixed for carrying four persons; had no top; it was pretty well worn; the harness were worn; fixed to work one mule to it; color of it black; thinks it had had posts, but had been sawn off; would call it a carriage, a kind of Jersey concern; it was like the one witness saw pass his house last; witness is positive there was a difference in color; the reason why he knows the blue carriage passed first, is because Meredith Brown's carriage was black, and he noticed the first one passed was blue.

The State next introduced *Samuel P. Wells*, who, being duly sworn, testified as follows: Heard of a man being killed on McDonough road; heard of it in a day or two after it was done; was out hunting on the 8th of April last; Mr. Landes and Mr. Crawley were with him; they passed Mr. Mobb's house, one of the party fired off a gun near Mr. Mobb's house; this was about 9 or 10 o'clock; went out to fish and carried a gun to kill birds for bait; turned off from the McDonough road at Mobb's house round his stables; this was on the 8th day of April last.

Cross-Examined.—Passed Williams's brick-yard and talked with the hands and then went on.

The State next introduced *Mrs. Salina Bolin*, who, being duly sworn, testified as follows: Heard of the death of Mr. Landrum about the time he was killed; saw Jones and Cobb next morning after she heard of the murder; thinks it was Friday morning; does not know the day of the month; they

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were coming from towards the grave-yard, going towards the railroad. Witness knew Mr. Jones and Mr. Crockett; this was between 9 and 10 o'clock, A. M.; did not speak to them; came close to W's house; W's house is near the water station; passed outside of W's yard; did not see any signs of traveling; it was in the month of April last; about the first of the month.

The State next introduced *James W. Clay*, who, being duly sworn, testified as follows: About the time deceased was killed, saw Cobb, Jones and Crockett near his house; the house is about three and a half miles from Atlanta, in direction of Decatur, off to the right of the public road three-fourths of a mile. When witness went up, Cobb and Jones were sitting on a log; Crockett was squatted down with a valise, tying up clothes in a handkerchief; witness and Crockett went down to witness's house; Crockett asked Cobb and Jones to go with them; they refused; Crockett went down and took dinner; Crockett carried Jones's and Cobb's dinner to them; witness went with Crockett; as they went up to them after they ate dinner up in the woods, W. took the plates and went back to the house; they all three went on with W. towards the house, in about 70 yards of the house; they all turned off the fence side and went towards Decatur; that is the last W. saw of them; they had two bundles of clothes in their pocket handkerchiefs; Crockett had one and Cobb one; W. carried the valise to the house; W. is a relation of Crockett; a second cousin; thinks this was on Friday; thinks it was in April last, the ninth of that month. No public road runs by W's father's house; it was about three-fourths of a mile from Decatur road where he saw Cobb, Jones and Crockett; they were on the side of the settlement road; this was some time between 10 or 11 o'clock, A. M.

Cross-Examined—They went out after dinner and struck another road; went through a neck of woods.

The State next introduced *John S. Shipley* who, being du-

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ly sworn, testified as follows: On Friday morning after the murder, saw some men coming down the road; is not acquainted with Crockett, Cobb and Jones; knew one of them was Crockett; two other men with him; just below the rolling mill they left the Decatur road or railroad. Thinks the the murder was committed on Thursday; was in April last; thinks about the 8th of April the murder was committed: thinks he saw those men on the 9th; knows it was Friday morning. The other two men with Crockett he thinks were young looking men. The rolling mill is on the Georgia Railroad and on Decatur wagon road; does not think he saw them more than ten steps; one of them had a valise; thinks this one was Crockett; does not think there was any road where they turned off; it was about ten o'clock when W. saw them; knows by the train passing; they were traveling the railroad; turn to the right hand going; Decatur is on the left side of the railroad from Atlanta.

Cross-Examined.—Thinks Cobb and Jones were with Crockett; cannot say positively that it was them. It has always been on his, W's mind it was the 8th day of April ever since he first heard it; had heard of the murder at the time he saw them going from Atlanta; had heard it talked of by the people that they were the guilty parties. They got off on the right side of the railroad; the public road is on the left where they got off.

The State next introduced *John D. Williams*, who, being duly sworn, testified as follows: Heard of the killing on McDonough road; was at work down below the Rolling Mill; thinks it was the same day he heard of the murder he saw two men on the railroad and one the wagon road. They met, passed down beyond the Rolling Mill and took the woods; went off on the right side of the railroad, going from Atlanta; in the woods—no road; thinks they had a valise; thought it was Cobb, Jones and Crockett at the time he saw; is not acquainted with them; knows them when he sees them; was about one hundred and fifty yards from them on

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the morning referred to ; the public road is on left side of railroad ; the railroad does not cross it under a mile from there ; thinks it was in April : it was the day W. heard of the murder; was about ten o'clock ; Mr. Shipley was with W. when he saw them ; the witness who just testified. They traveled the railroad about fifty or one hundred yards after they all got together.

Cross-Examined.—They were about the water station when W. first saw them ; W. and Mr. Shipley were right together, and did not separate while they saw them ; there is a crossing where they got off; goes into the woods and stops. The man with the valise came up with the other two at the Rolling Mill ; got on the railroad.

The State next introduced *Coleman Ford*, who, being duly sworn, testified as follows: Heard of the killing about the time specified and testified ; saw Cobb, Jones and Crockett on the 9th of April last, east of the city of Atlanta about two and a quarter miles on south side of the Georgia railroad ; were not on any public road ; it was about one and a half miles from Sam'l Clay's house ; that road intersects the road going by the grave-yard ; one of them had a valise ; is acquainted with Jones and Cobb ; was not with Crockett ; thinks it was between ten and eleven o'clock, A. M.

The State next introduced *John N. Pate*, who, being duly sworn, testified as follows: Remembers hearing of the killing ; saw Cobb, Jones and Crockett on the 9th day of April last ; saw them at the Decatur depot, between one and two o'clock ; thinks they had two handkerchiefs tied up ; clothes in them ; they passed down the railroad and then took the wagon road to Stone Mountain. Is well acquainted with Mr. Crockett ; has seen Mr. Cobb several times ; did not know Jones at the time ; now recognizes Jones ; Williamson Cobb came up ; after he came, he, W. saw the parties ; Wm. Cobb and John are brothers ; Jones is a cousin ; came down railroad from Atlanta ; this was Friday evening.

Cross-Examined.—Saw them go into the wagon road to

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Stone Mountain; noticed them particularly; passed the road some few steps; stopped, turned back and took the road.

The State next introduced *George W. Wheeler*, who, being duly sworn, testified as follows: Heard of the killing that took place last spring in this county; saw Jones and Cobb Sunday after it took place; does not know the day of the month; they were at Mr. Jones' brother's house in the county of Newton; this is about thirty-six or thirty-seven miles from Atlanta.

Cross-Examined.—Mr. Cobb said he was indicted in Fulton county and Court was in session and he did not want to appear. By forfeiting the bond he would only have to pay eight or nine dollars; said he was going to his grand-father's; would be back to Atlanta in three or four days; Jones said he expected to live with Mr. Dean; said he had been thinking of it for some time; had not got off; Dean lived four or five miles from where W. saw them; said they were so lonesome they wished they had come back Sunday morning; was coming back on Monday morning; W. was at the same place on Tuesday; they were gone; Cobb's grand-father lives near the corner of Clark county; Jones was going to work with Mr. Dean.

The State next introduced *William P. Sewell*, who, being duly sworn, testified as follows: He has seen the slung-shot exhibited in Court before; saw it last in this place last April; W. made it for a man by the name of Radford J. Crockett; made it some time in April last; don't know the day of the month; made it at Tomlinson & Barnes's copper shop, and delivered it to Crockett.

The State next introduced *Thomas Calloway*, who, being duly sworn, testified as follows: He was in jail soon after the killing testified to in Fulton county. Jones and Cobb asked witness if they could not turn State's evidence against Crockett; they were afraid Crockett would turn State's evidence against them; witness told them there was a way

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to get out of it that way; Mr. Cobb said he would know the slung-shot if he were to see it; went on to describe it; said the string it was fastened to was a piece of soft leather, instead of gum elastic; there was a wire fixed in the sling-shot, to fasten the leather to; they described it as an eye on each side of it; did not say of what material it was made; said a man by the name of Sewell made it; Cobb said they left town with Crockett; went out and took dinner with a relation of Crockett's; they did not go in the house; Crockett brought them something to eat; they did so; went on then three miles below Decatur; Crockett went to his aunt's, Mrs. Richardson; Mr. Cobb said they were sorry they left town with Crockett—if they had not, they would not have been suspected; Mr. Jones said if ever he got out of this scrape, it would be the last; that he intended to live by his labor. This conversation took place the second evening after Jones and Cobb were confined in Fulton jail, and before it was known Crockett was arrested. Mr. Cobb said if Crockett turned State's evidence it would hang them; Mr. Jones said it would; says he would know the slung-shot from the description given; says the one exhibited in Court is the one.

Cross-Examined.—Mr. Cooper, Solicitor General, showed him the slung-shot last week; did not know Cobb and Jones personally before in jail; had seen them before; has been in and about Atlanta, for six or seven years; there were several in jail; Rice, Carter, and others; they must have heard the same; told his brother-in-law, Noel Inge, of what he had heard in jail; witness has a case in Court himself; charged with assault and battery; was on bond and came to his case from South Carolina; talked with Mr. Cooper first, after he was subpoenaed; Cobb said he had seen the slung-shot, and would know it if he were to see it; witness never described the slung-shot before he saw it; the first time witness saw the slung-shot exhibited in Court, he recognized it as the one described by Cobb; witness examined very par-

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ticularly when he first saw it, and his mind came to the conclusion it was the one described by Cobb in jail.

The State now tendered in evidence the above mentioned slung-shot, but on objection from the prisoner, the Court rejected it as not being such an instrument of evidence as had to be formally tendered and submitted to a jury, *as in the case of a deed or bond.*

The State next introduced *R. W. Craven*, who, being duly sworn, testified as follows: On the day the murder was committed, he was out in the direction of the same; left town about one o'clock; does not recollect the day of the month or week; thinks it was on Thursday; not positive; thinks he heard the murder was committed late the same evening. He rode out, went on, after passing Mr. Mobbs's a half mile or three quarters, saw a mule standing beside of the road; passed by; went down and saw the man Perkins; they went to see, and came on back; saw the mule as they came on back near Mr. Gammon's; the mule had on the forepart of the harness; the breeching was gone; the chains were dragging the ground; the lines were dragging on the ground; it was a pale bay or sorrel mule; where witness first saw the mule was about three-fourths of a mile from Mr. Mobbs's house. It was not attached to any vehicle when witness first saw it; the time of day when witness first saw the mule was about two o'clock; knows this because it was about four o'clock when witness got back to Atlanta; heard of the murder that evening after he came in town; it was six miles to where witness went in the country; this was on the McDonough road.

The State next introduced *Gen. Eli McConnell*, who, being duly sworn, testified as follows: Says he is principal keeper of the Penitentiary; has been holding that office during the time that Cobb and Jones were confined in the Penitentiary for safe keeping; (letter handed to witness,) says he received it the latter part of May; when witness opened it he found the body of it addressed to Cobb and Jones; when

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he found the letter was addressed to these men with a note to witness he took the letter and went to the Penitentiary; read the letter first to Mr. Cobb; also read the note addressed to witness, on the letter; after he had read the letter to Cobb, witness stated to Cobb, you see now what this man Crockett has written to you and witness, observed he had no motive only for your good, and that witness having no motive himself only to give Cobb's answer to it; witness then asked him what he had to say in reply. His reply was that he should make no confession; thinks the exact words used by Cobb in reply were, I wont confess. (The letter was then read to the jury.)

The following is a copy of said letter:

ATLANTA, May the 27 1858.

Dear friends i now take this opportunity of dropping you a few lines to inform you that i am well at present—Gabe i would like to see you and John very much but i dont gess i will ever see you any mor as my time is close at hand to go but i hope i will meet you in a better world than this. Gabe i want you to send me word how you are a getting on and if you think god has forgave you yet al of your sins and whether you intend to try to meet me in heaven or no. Gabe i think if you will come out and make a full confession of the murder of Landrum and look to god for mercy you would be better satisfied if you dont you can never get to heaven i dont think Gabe if i could get out of Jail and be free by giving up my hope in the Lord and my chance for heaven, i would not do it if you had the love and fear of god in your heart i think you would not give it up for the sin ful world and all that is in it religion is worth a thousand such worlds as this religion is a fortune and heaven is a home yes and a happy one two the Lord ses seek me with your hoal hart and you shal find me pray with your hoal hart an you shal nevr die but heve eturnal life You think of the owful toremnts of hell you will then turn to god i think and try to seek a home in heaven Gabe you and John may think that i am

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just a trying to get you to confess so that you will be hung but it is not so if it was in my power to turn you loos or clear you i would do it i no that you will both be hung there is no chance for you to escape it if you had staid here you would have ben hung without any trial i only want you to try to serve god and prepare for a better world while you have got the chance i think if you will study on it you will think that i am giving you good advice Gabe i would like to no that i would meet you and John in heaven

I remain yours until death

RADFORD J. CROCKETT.

To the principal Keeper, I received your letter and was glad to hear from the boys i was thankful to you for the information y gave me of them read this letter to them if you please and see if it wont have some effect on them and which it seems to take the most effect on and talk with them and tell them to answer my letter and write to me what they say or whether they seem to not wan to talk about it or no write to me how they are getting on you note that Gabe was sick write how he is rite as soon as possible I remain yours with respect

RADFORD J CROCKETT

Cross-Examined.—At the time Cobb made this reply witness was his keeper in the Penitentiary; unlocked the cell and went in to him; after reading the letter to Cobb, he kept it in his possession; does not know how it came here.

The State here closed.

The counsel for the defence then introduced *Jacob Carter*, who, being duly sworn, testified as follows: Was subpœnaed in this case to-day; was confined in Fulton county; was in about the spring Term of the Superior Court; was in jail when Cobb and Jones were put in jail; they were committed to jail on Tuesday evening about sun down; Powell Rice and Thomas Calloway were in jail with witness, before Jones and Cobb were put in; we three were together before they

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were put in; Jones and Cobb were confined in the cage with us; did not hear anything said to Cobb or Jones or any conversation with any other person in reference to the murder of Landrum; did hear Calloway say to Jones and Cobb about Tuesday night of the same day they were put in; never heard but one conversation between them; we were all in the cage together; Powell Rice was lying down; don't know whether he heard it or not; the other four were sitting up; Thomas Calloway told Cobb to turn State's evidence against Crockett, and John Cobb told him he didn't know anything to turn State's evidence for; Calloway then asked Gabe Jones what he thought about it; Gabe Jones told him he did not know anything to turn State's evidence for; that is all witness knows; there was nothing said about a slung-shot or a sling-shot on that occasion or at any other that witness heard; there was nothing said about Jones and Cobb leaving Atlanta with Crockett; nothing said about their traveling together.

Cross-Examined.—Says he is about twenty-six years of age; does not know the day of the month or year he, witness, was put in jail; has got a good memory, and is perfectly positive that he did not hear any conversation between Calloway, Jones and Cobb; says he was put in jail on Monday; knows that Dink Carlton was not in jail when witness was in jail; thinks he knows this month is October; thinks last month was December; March, May, June, July, November, December and August; these are all the months witness knows of in a year and can name; Cobb and Jones were put in about a half an hour by sun on Tuesday evening, and is certain that the conversation Calloway had with Cobb and Jones, was on Tuesday evening; he cannot instance anything that impressed it on his memory that it was Tuesday the conversation; thinks it was about nine or ten o'clock the conversation took place; is positive it was dark and they had no light in the room; it was perfectly dark in the cage; had a little talk with Cobb and Jones; nothing

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about the difficulty; had no conversation with Powell Rice; just talked backwards and forwards; witness did not talk any with Cobb and Jones on Wednesday; saw Wm. Cobb this morning at W's mother's house; was coming to town with him and met McDonald the constable; came on with him; is positive Calloway did not have any other conversation than the one he testifies to with Cobb and Jones; witness came in town about eleven o'clock; eat dinner at old man Cobb's; Wm. Cobb passed as his son; witness don't know the reason why he was turned out of jail; had sometimes one meal in jail and sometimes two; had but one meal on Monday; that was Monday night; eat two meals on Tuesday, and one on Wednesday; did not mention to any one what his testimony would be at any time; not a single soul until he went on the stand; no person has conversed with him to-day; or at any time before to-day in regard to his testimony, and he knows he is right; no lawyer or any other person.

Counsel for the defence next introduced *Mrs. Missouri Cobb*, who, being duly sworn, testified as follows: She is the mother of the prisoner; her son left on Friday the 9th of April last; prisoner was at home the day before at twelve o'clock on Thursday, dined at twelve o'clock; Savannah, Missouri, Eveline and old man and prisoner at witness's, were at dinner that day; when she says twelve o'clock she is governed by a clock and the Georgia Railroad shop bell; those that work out come home at that hour, twelve o'clock, and dinner is always ready; lived on Collins street, on the East side of the Georgia Railroad; Mrs. Thurman and Mrs. Craven were witness's nearest neighbors; it was the forepart of the day prisoner left witness's house; he left for Skull Shoals; don't recollect what he said he was going for; did not state what he was going for; said he was going down there on account of a woman; never saw prisoner any more after he left for Skull Shoals until now in the court house.

Counsel for defence next introduced *Savannah Cobb*, who,

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being duly sworn testified as follows: Says she is a sister of the prisoner; he left her father's house on the 9th of April last; the day before that at dinner, mother, father, sister, brother, and self and prisoner; twelve o'clock generally is the dinner hour; are controlled by a time piece and the Georgia Railroad bell; has not seen her brother since he left on Friday morning till now; heard him say he was going to Skull Shoals; the inducement to go was on account of a letter he received from a woman; he received the letter on the 8th of April last, and started the next morning; does not recollect the hour; those that work come in about twelve o'clock, and they have dinner about that time; controlled by a clock and a bell.

Counsel for defendant next introduced *S. B. Love*, who being duly sworn, testified as follows: He is the Sheriff of Fulton county; was at the last Term of the Court; Crockett, Jones and Cobb, were not in the court-house during last Court together; all of them were in the court-house, but thinks on different days.

Counsel for defence next introduced *Elkannah Dean*, who, being duly sworn, testified as follows: He lives in Newton county, near Jasper Jones, about six miles from him; he is a brother of Thomas Jones; Gabriel Jones was under an engagement to be at witness's house on the 1st to the 15th of April, 1858; witness hired him for four months; the contract was made the last of March, of the present year; is second cousin to prisoner and to Gabe Jones.

Cross-Examined.—John Cobb, Jr., was not under any obligations to be at witness's house at the first of April last; knows where Skull Shoals are; would go on by Covington to go there; Jasper Jones lives some 8 or 9 miles from Conyers' Station; there is a fork in the road at Conyer's, near Dr. Steward's; Jasper Jones's house is not on the most direct route from here to Skull Shoals.

Counsel for defence next introduced *Duke H. Brannon*, who being duly sworn, testified as follows: He arrested

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Jones and Cobb on Monday evening, after Landrum was reported killed; arrested him at the crossing this side of the depot at Decatur, near Mr. Wilson's; Jones and Cobb were coming this way, towards Atlanta.

Cross-Examined.—John Cobb looked very bad when witness arrested him; he looked like a dead man; his countenance changed when we arrested him; his countenance changed; he looked very much alarmed; when witness first saw them they were coming out of a woods pasture; witness concealed himself when he saw them; they were near the crossing when arrested; when witness first saw them they were about half a mile off; there was no person with them; they were coming by themselves; it may be half a mile from depot at Decatur, to where they arrested them, or more or less.

Counsel for defence next introduced *Anderson Powell Rice*, who, being duly sworn, testified as follows: Was in jail last April; Mr. Carter, Mr. Jones, Mr. Cobb and Mr. Calloway; does not recollect the day Jones and Cobb were put in; all were together in the same cage; did not hear any conversation between Jones, Cobb and Calloway, in regard to turning State's evidence; heard nothing about the death of Landrum; did not hear anything in reference to a slung-shot; did not hear anything about Jones and Cobb having left with Crockett; Mr. Calloway was put in jail with witness; don't know how long they were in before Jones and Cobb; Calloway and witness went in together and came out together.

Cross-Examined.—Witness was put in jail the second week of Court; staid in there about three days; does not know how long it was after witness was put in until Cobb and Jones were put in; witness did not have any conversation with them, or any others of them about Crockett and Landrum; does not remember any conversation had the night they were put in; did not pay particular attention to all the talk had in jail; Cobb and Jones might have talked,

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and he, witness, not heard; never talked about the Landrum killing none at all; no talk in jail about nothing of that kind; it was in the month of April, 2d week of Court, as well as witness recollects; never heard any thing of the Landrum killing until he came out jail; never knew what Cobb and Jones were put in for; don't know that he did hear all that was talked about in jail; knows Jacob Carter, was in jail with him, in same cell; did not hear Calloway advise Cobb and Jones to confess the night after they came in; on Sunday, before witness was put in jail, was at home, 4 miles from town; was not in town any the week before he was put in; he, witness, staid about the Court-house nearly all day the day he was put in jail; there was quite a crowd around the court-house that day; did not hear anything the day he was about the court-house, about the killing of Landrum, or any other man; was put in jail on Monday; came out on Wednesday or Thursday; bailiff found witness at his father's to-day; nothing said to witness by Cobb and Jones about confessing; could not swear they did not say something about it to Calloway; the cage is about 8 feet wide. The defence here closed.

On closing the examination of each of the following named witnesses, James Hill, Josiah Gammon, Lawrence Hutchings, and Willis F. Westmoreland, and at the close of the direct examination of Silas B. Kent, and before said witnesses respectively left the stand, the Court, at the request of the Solicitor General, and against the objection of defendant, permitted the notes of their evidence which, had been taken down by an amanuensis, appointed by the Court but not sworn, which notes the presiding Judge himself had never read, to be read over to said witnesses respectively, (his own evidence to each witness,) in the presence and hearing of the jury, for the purpose of having the witnesses to say whether their evidence was taken down correctly or not, and having them to point out any alteration or addition that might be requisite to make the said notes conform to the evi-

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dence as actually delivered. And the Court, in each instance, allowed the witness to assent, in presence of the jury, to the correctness of the notes as they were read to him, either by his silence, or by a general "yes," or if he (the witness) thought them incorrect, to have them altered or added to, till he (the witness) could endorse them. To all which reading, assenting to, and altering said notes, in the presence and hearing of the jury, the defendant objected in every instance as soon as the reading was proposed, and the Court, in every case, overruled the objection. And to which several decisions of the Court overruling said objection and permitting said notes to be read, assented to as correct, or altered, the defendant excepts, and assigns the same for error.

When the slung-shot was exhibited to Willis F. Westmoreland, as stated in the foregoing notes of his evidence, and the witness was asked if he thought such wounds as some of those he had described, could be caused by such an instrument; defendant objected to his expressing any opinion on that point to the jury. The Court overruled the objection and permitted the witness to give his opinion as evidence; to which decision of the Court the defendant excepts, and assigns the same for error.

During the examination of Thomas Calloway, by the Solicitor General, he was asked whether if he were to see the slung-shot, described to him by Cobb, he thought he would recognize it from the description? He said he would. The slung-shot, in Court, was then shown to him. Defendant objected to his stating whether or not this was the one Cobb described. The Court overruled the objection, and permitted the witness to state that he recognized it from the description given by Cobb; and to this decision of the Court, defendant excepts, and assigns the same for error.

When Eli McConnell was on the stand, and after he had stated all the facts set forth in the foregoing notes of his evidence, down to where he asked Cobb what he had to say in

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reply, (the letter referred to by the witness having also been read over to the Court,) defendant moved the Court to exclude any evidence of the reply, on the ground that said reply, if tending to criminate the defendant, was rendered inadmissible by the circumstances under which it was made, and by the improper influences brought to bear on defendant's mind, through the letter and statement of witness as to Crocket's motive in writing, &c. The Court overruled this motion, and permitted the reply to go to the jury as evidence, and to this decision of the Court defendant excepts, and assigns the same for error.

As soon as the reply as testified to by McConnel, came out, defendant moved the Court to withdraw the same from the jury, together with all the previous statements of said witness, on the ground, 1st, that the reply was no confession, but a refusal to confess; 2d, that if a confession or in the nature of a confession, it was not legal evidence for the same reasons before urged against its admission. The Court overruled this motion also; and to this decision of the Court defendant excepts, and assigns the same for error.

When the letter referred to by McConnel, a copy of which is above inserted, was offered in evidence by the State, defendant objected to its being read to the jury; 1st, because there was no proof whose letter it was, or by whom written; 2d, because the contents were illegal testimony, and wholly irrelevant to the issue. The Court overruled the objection, and permitted the letter to be read to the jury, (without any proof, whatever, of its execution,) to which ruling of the Court defendant excepts, and assigns the same for error. The Court admitted the letter for the sole purpose of explaining the import of Cobb's reply to McConnel, and so charged the jury.

Notwithstanding the slung-shot had been offered in evidence, and ruled out, as stated in the notes of the evidence, the Solicitor General, in his concluding argument to the jury, brought it before them, and holding it up in their

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presence said, it was a witness in the case, and commented upon it as such, alleging that it proved divers material facts, and especially the fact that Cobb and Crockett were together on the day of the killing. To this course of the Solicitor the defendant at once objected, and called upon the Court to prohibit it, but the Court declined to interfere, holding that the Solicitor might exhibit the weapon to the jury, it having been frequently exhibited and identified in their presence before, and saying that the calling it a *witness* was a mere matter of taste. To this ruling and refusal of the Court the defendant excepts, and assigns the same for error.

The Solicitor, after this decision of the Court, persisted in displaying said slung-shot to the jury, and remarking upon it as above.

Arguments having been closed, the Court charged the jury, among other matters, as follows:

GENTLEMEN OF THE JURY:—You have been often reminded, during the progress of this trial, of the importance of the cause committed to you, and I again remind you that it is a case of most momentous importance, both to the State, and to the accused. To the State, because society is deeply interested in the maintenance of the majesty and dignity of the laws, and the protection of its citizens. For neither you or I have any security for our lives, our liberty, our reputations, or our property, except in that law which spreads the broad shield of its protection over us, as well in our defenceless slumbers, as while pursuing our daily avocations. To the accused, because, with him, it is a question of life or death, or of liberty or imprisonment.

But important as the issue is, it is to be determined like every other question of fact—by the evidence detailed from the stand; and however momentous the results may be to the State, or to the prisoner, when you have discharged your duty according to your oaths, and your consciences, you are no further responsible for consequences.

You have been cautioned against the influence of popular

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prejudice. After the oaths you have taken, I will not insult you by presuming the possibility that your verdict can be influenced either by prejudice on the one hand, or misplaced sympathy on the other.

Three defendants were jointly accused in this bill of indictment—Radford Crockett, Gabriel Jones and John Cobb, Jr. The case of Crocket has been disposed of. The other two defendants have severed in their trial, as was their right, and John Cobb is now alone on his trial, and his guilt or innocence is the only issue to be determined.

The prisoner is charged with the murder of Samuel Landrum, on the 8th day of April, 1858, in the county of Fulton, and upon the State rests the burden of establishing it by proof. The law presumes every man innocent, until he is proven guilty. It clothes him with a mantle of innocence which can be stripped off only by proof, and such proof as convinces the mind beyond a reasonable doubt.

Murder is defined to be the unlawful killing of a human being in the peace of the State, by a person of sound memory and discretion, with malice aforethought, either express or implied. Express malice is that deliberate intention to take the life of another which is manifested by external signs capable of proof, such as lying in wait, previous threats, or the like. And malice is implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart. Where the homicide is proven to have taken place by violence, the law presumes malice, unless the circumstances show the absence of it.

In this case, it is unnecessary to charge you upon the lower grades of homicide. There can be no intermediate verdict between that of guilty of murder, and that of not guilty. If the prisoner is not guilty of murder, he is guilty of nothing; and whether he is guilty or not, it is to be determined by the evidence—the only way known of arriving at truth in judicial investigation.

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Evidence is distinguished into two kinds—positive, or direct, and presumptive, or circumstantial. Positive testimony is, when a witness speaks directly from personal knowledge of the principal fact to be proven. Circumstantial evidence is, when the witness does not testify to having witnessed the main fact, but to circumstances *tending* to prove the existence of the main fact. By way of illustration, suppose that, in a charge of murder, a witness swears that he saw the fatal blow inflicted; that would be positive testimony. But in a case when a dead body has been found, with marks of fatal violence upon it, and no witness saw the deed perpetrated, but A. testifies to the fatal character of the wounds; that is one circumstance. Another witness swears to the finding the bloody instrument of death in close proximity to the body; that is another circumstance. A third witness proves that he saw the accused in the immediate neighborhood of the killing, about the time it must have taken place, and a fourth identifies the instrument found, as having been recently in the possession of the accused; this is presumptive, or circumstantial evidence, and affords either a violent or a weak presumption of the truth of the principal fact, *to-wit*: the guilt of the accused, in proportion to the number of the circumstances—their character—their connection with each other, and their probable relation to the main fact.

It matters not by which of these kinds of testimony a fact is established, provided it is sufficiently convincing in its character to authorize a jury to find the fact true. And, perhaps, the best test of the weight of evidence, whether positive or circumstantial, is the impression it makes upon the minds of reasonable and prudent men. Many kinds of offences can rarely be proven in any other way than by circumstances—such as forgery, arson, and secret assassination, are usually perpetrated in darkness, and with all the precaution of cunning to hide them. Now, one isolated circumstance may afford but very slight indication of guilt,

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but, connected with others, it may assume a very grave importance; and one circumstance may explain another. To illustrate this idea: suppose that a human body is discovered with an incised wound in a vital part. Now, if it should be proven that a certain individual was seen close to the scene of the killing, near the time at which it must have taken place, that would be a circumstance indicating that this individual was the slayer; but by itself, it raises too slight a probability to authorize his conviction. But, suppose, further, that a bloody knife were found near the body, with a blade corresponding to the width and depth of the wound, and identified as the property of this individual. Then the first circumstance mentioned, though by itself affording but a slight presumption, when connected with the second, assumes a much graver character; and every additional circumstance, tending to the same point, increases the force of the presumption until it may amount to absolute conviction. But the circumstances, to authorize a conviction in a criminal charge, ought to be such as to satisfy the mind to a reasonable certainty—such as to exclude all other reasonable hypothesis than that of the guilt of the accused; for if you can, taking all the circumstances to be true, reasonably account for the killing of Landrum in any other way than by the agency of the accused, you are bound to do so; but if you believe them to be proven true, and cannot make them consistent with his innocence, you must find him guilty.

The Court having laid down these general principles of law, it is for you to apply them to the facts of this case.

The first inquiry will be, "has a homicide been committed?" "Is Samuel Landrum dead?" "What caused his death?" "Did he die by the act of Providence, by his own hand, or by the hand of violence?" "If he met a violent death, who was the guilty agent?" "Was it the prisoner at the bar?" And in this connection, I lay down another legal proposition: Where two or more persons, acting together

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with a common intent and purpose, are present at the commission of a crime, though the deed may be wrought by the hand of one alone, all who are present, aiding, abetting, or giving countenance to it, are alike guilty. The law makes no distinction between them. And if Cobb and Jones and Crockett were all present at the killing of Landruin, acting together with joint purpose and intent, it makes no difference by whose hand the fatal blow was inflicted; they are all equally guilty of murder.

Taking these rules for your guide—and you are judges of the law as well as of the fact—is John Cobb, Jr., guilty, or is he not guilty?

A good deal of argument has been had upon the discrepancy between the witnesses in this case. When an apparent discrepancy exists between the testimony of different witnesses, it is the duty of a jury to reconcile the whole together, if it can be done, so as not to impute perjury to any one. And when witnesses agree as to the important fact testified to, slight discrepancies in the collateral attendant facts, afford no ground to discredit them. For instance, suppose the important fact to be proven is, whether a certain man passed along a certain highway on a given day. Half a dozen witnesses might see him pass, and all differ as to the time of day he passed—the color of his clothes, the persons who preceded or followed him; yet, if they all agreed as to the main fact, there would be no reason to discredit their veracity.

I am requested to charge you upon the subject of positive and negative testimony. It is a rule, that a witness swearing positively to a fact is to be believed in preference to many who swear negatively to the same fact; that is, that they did not see it. To give a familiar illustration: If the twelve jurors in that box were in a certain room in which there was a clock, and after coming out, the question should be raised, whether the clock struck a certain hour while they had been there; if three were to swear that they heard it, and the

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other nine that they had not heard it, the three must be believed rather than the nine; but, if they had all gone in there, for the purpose of ascertaining whether the clock would strike at a certain hour, and all equally attentive, then the testimony of all would be positive.

The charge of the Court has also been invoked upon the subject of confessions.

The rule of law is, that evidence of confessions is to be received with great caution. This salutary rule is founded on our experience of the infirmity and uncertainty of human memory. A witness testifying to a confession may not have heard it distinctly. The loss of one word may change the import of a whole sentence. The witness, if he hears it distinctly, may not remember it accurately. For these reasons, it would be very unsafe to convict, on a confession alone, uncorroborated by other proof. The same principle applies to a response made by an accused, to the declaration of another. The letter purporting to have been written by Crockett, (and it matters not whether written by him or not,) was admissible, not to prove any fact asserted in it, but for the purpose of ascertaining the import of the response made to it, when read to him, and for no other purpose.

Taking, now, these rules of law, and applying them to the facts of this case, are your minds satisfied, beyond a reasonable doubt, that the prisoner is guilty? If they are, it is your duty—your sworn duty—by your verdict, to find him so. If they are not, it is equally your sworn duty to find him not guilty. By a reasonable doubt, is meant such a doubt as, arising from the evidence, would fasten upon the mind of a reasonable man, and prevent his coming to any settled conclusion. Absolute certainty is not attainable by any mode of human investigation. A reasonable certainty is all, therefore, that it is possible to attain to.

And now, gentlemen, the case is fully committed to your hands, and it remains for you to discharge your part of this

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important duty, and I doubt not that you will discharge it fearlessly and impartially.

Three defendants were indicted by this bill of indictment, Crockett, Jones and Cobb; Crockett's case has been disposed of and Jones is not on trial. The issue therefore, for you to try is, "is John Cobb, Jr., guilty of the murder of Samuel Landrum," and you have nothing to do with the guilt or innocence of any one else at present; and prisoner by his counsel excepted.

Murder is the killing of a human being in the peace of the State, by a person of sound memory and discretion; with malice aforethought, express or implied—this definition was repeated three times; and prisoner, by his counsel, excepted. The Court then gave the definitions of malice, express and implied, and remarked, where the homicide is proven to have taken place by violence, the law presumes malice, unless the circumstances show the absence of it; and prisoner by his counsel excepted. The Court proceeded, "in this case it is unnecessary to charge you as to the lower grades of homicide; there can be no intermediate verdict between guilty of murder and not guilty. Whether he is guilty or not can be determined by the evidence alone;" and prisoner by his counsel excepted.

The Court, in explaining to the jury the difference between positive and circumstantial evidence, and in telling them what circumstantial evidence was, and what weight ought to be given to it, used this language: "If, in a charge of murder, a witness swears that he saw the fatal blow inflicted, that would be positive evidence. But in a case where a dead body has been found, with marks of violence on it, and no witness saw the deed perpetrated, but A. testifies to the fatal character of the wounds, that is one circumstance. Another witness swears to finding the bloody instrument of death near the body, that is another circumstance. A third witness proves that he saw the accused in the immediate neighborhood of the killing about the time it must have taken place,

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and a fourth identifies the instrument as having been recently in the possession of the accused—this is presumptive evidence and affords either a violent or weak presumption of the principal fact, to wit: the guilt of the accused in proportion to the number of circumstances, their character, their connection with each other, and their probable relation to the main fact ;” and prisoner by his counsel accepted.

The Court said it was immaterial by which of these kinds of evidence a fact is established, provided it is so convincing as to authorize a jury to find the fact true, and perhaps the best test of the weight of evidence, perhaps better than all technical rules, whether the evidence is positive or presumptive, is the impression it makes upon the minds of reasonable and prudent men ; and prisoner, by his counsel excepted, and excepted to the next sentence of the charge, to wit: many kinds of offences can rarely be proven otherwise than by circumstantial evidence, such as forgery, arson and secret assassination, are usually perpetrated in darkness and with all the precaution of cunning to hide them.

The Court said, “the circumstances, to authorize a conviction on a criminal charge ought to be such as to satisfy the mind to a reasonable certainty, such as to exclude every reasonable hypothesis, other than the guilt of the prisoner. For if you can, taking all the circumstances to be true, reasonably account for the killing of Landrum, in any other way than by the agency of the accused, you are bound to do so, but if you believe them proved true and cannot make them consistent with his innocence, you must find him guilty ; and prisoner by his counsel again excepted.

The Court said, when two or more persons, acting together with a common interest and purpose, are present at the commission of a crime, though the deed may be done by the hand of one alone, all who are present, aiding or abetting or giving countenance to it, are alike guilty ; and prisoner by his counsel excepted.

The Court further said, when an apparent discrepancy ex-

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ists between the testimony of different witnesses, it is the duty of the jury to reconcile the whole together, if it can be done, so as not to impute perjury to any one. And when witnesses agree as to the important fact testified to, slight discrepancies in the collateral attendant facts, afford no ground to discredit them. For instance, suppose the important fact to be proven is, whether a certain man passed along a certain highway on a certain day, half a dozen witnesses might see him pass, and all differ as to the time of day he passed, the color of his clothes, the persons who preceded or followed him, yet if they all agree as to the main fact, there would be no reason to discredit their veracity—such discrepancies are of no consequence at all; and prisoner by his counsel excepted.

The Court proceeded: I am requested to charge you upon the subject of positive and negative testimony. It is a rule that a witness swearing positively to a fact, is to be believed in preference to many who swear negatively to the same fact—that is, that they did not see it. To give a familiar illustration. If the twelve jurors in that box were in a certain room in which there was a clock, and after coming out, a question should be raised as to whether the clock struck a certain hour while they had been there, if three were to swear that they heard it, and the other nine that they did not hear it, the three must be believed rather than the nine. But if they had all gone there for the purpose of ascertaining whether the clock would strike at a certain hour, and all equally attentive, then the testimony of all would be positive; and prisoner by his counsel again excepted.

The Court then charged the jury, that the evidence of a confession ought to be received with great caution, and that the letter purporting to have been written by Crockett, was admissible, to show the purport of Cobb's reply, and nothing more; and then closed by saying, taking these rules of law, and applying them to the facts of this case, are your minds satisfied beyond a reasonable doubt, that the prisoner is guilty.

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ty? If they are, it is your duty—your sworn duty—to find him so. If they are not, it is equally your sworn duty to find him not guilty. By a reasonable doubt, is meant, such a doubt as arising from the evidence, would fasten upon the mind of a reasonable man, and prevent its coming to any settled conclusion. Absolute certainty is unattainable by any mode of human investigation—a reasonable certainty, is all, therefore, that it is possible to attain to; and prisoner by his counsel again excepted.

The jury retired, and returned a verdict of guilty.

Afterwards, upon a day during said Term, a motion for a new trial was made by the defendant, upon the following grounds:

1st. Because the Court erred in permitting the letter signed, R. J. Crockett, to be read to the jury, as evidence.

2d. Because the Court erred in admitting in evidence, the declarations of defendant, made in the penitentiary, as testified to by Eli McConnel.

3d. Because the Court erred in overruling the motion of defendant's counsel, to strike out, and withdraw from the jury, all the evidence of Eli McConnel.

4th. Because the Court erred in charging the jury that "murder is the killing of a human being in the peace of the State, by a person of sound memory and discretion, with malice aforethought, either expressed or implied."

5th. Because the Court erred in saying to the jury, that the evidence justified him in giving them in charge the rule, that when two persons do an act with a common intent, it is immaterial by which the blow was stricken, provided the other is present, aiding, abetting, or giving countenance to the act.

6th. Because the Court erred in charging the jury, that they had nothing to do with the guilt or innocence of any person except the individual on trial.

7th. Because the Court erred in charging the jury, that

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discrepancies in evidence or between witnesses, were of no consequence, unless they were upon the main fact.

8th. Because the Court erred in instructing the jury, that there was a common sense rule for determining the weight and sufficiency of evidence, better than all technical rules.

9th. Because the Court erred in allowing its notes of the evidence of James Hill, Josiah Gammon, Lawrence Hutchins, Willis Westmoreland and Silas B. Kent, to be read over, in the presence and hearing of the jury, before said witnesses retired from the stand.

10th. Because the Court permitted the Solicitor General, to bring before the jury the "slung-shot," while making the concluding argument, and speak of it as a witness, when it had previously been offered in evidence and ruled out.

11th. Because the verdict of the jury was contrary to evidence, and the decided weight of evidence, and contrary to Law.

12th. Because Peter Ball, was an incompetent juror, having said before he was impaneled, that if he was a juror in said, Cobb's, case, he would stay there until he rotted but that he would find him guilty.

13th. Because Jackson Jett, was an incompetent juror, having made declarations previous to his being impaneled, to the effect, that he would, if on the jury, be certain to find the prisoner guilty.

14th. Because the Court instructed the Sheriff, previous to the trial, to direct the different Constables of the county, to summon tales jurors for said trial, and the said Constables did accordingly summon a large number of the tales jurors who were put upon the prisoner.

The affidavits of Jno. W. C. Evans, in support of the 12th ground, of Wm. Kile, in support of the 13th ground, and the affidavit of Jno. Cobb, Jr., that he was ignorant of the facts sworn to by them, until after verdict, were submitted by the prisoner: (which affidavits charged as set forth in said grounds.)

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The affidavit of Peter Ball, denying the charge as to himself, and of Jackson Jett, denying the charge as to himself, and the affidavits of Wm. Markham, James Loyd, W. W. Roak, *et al.*, to the effect, that they were acquainted with the character of said John W. Evans, and would not believe him upon oath in a Court of Justice, were submitted on the part of the State. (And which said affidavits were made a part of this bill of exceptions, and certified by the Clerk to the Supreme Court.) Prisoner by his counsel, proposed to show by witnesses, that Jno. W. Evans, was worthy of belief on oath, and the Court said, if that were done it would leave the oath of Jett against the oath of Evans, and Evans's character still doubtful, and therefore, he would refuse it; and prisoner by his counsel excepted.

— Jones, made oath in open Court, that William Pucket had informed him, that he heard said Jett say, before said trial, that if he were caught upon the jury, he did not see how he could get around hanging the boys—meaning prisoners; and that said Pucket had been taken violently ill, since said trial; that he had gone to get his affidavit; that Pucket had a spasm, and that the Physician attending on him, said he was not in a proper condition to give an affidavit. One of defendant's counsel stated the same thing as to Pucket's illness and inability to give an affidavit. This was on Monday morning, and the Court postponed the motion, and gave defendant's counsel until the next Monday to procure the affidavit of Pucket.

The Court proceeded on Tuesday morning to hear and determine the motion for a new trial, further time to procure Pucket's evidence not being asked for, and no evidence offered that he was still unwell, and after reading the affidavits on file, and hearing argument, overruled said motion, and refused the new trial; to which refusal defendant excepts, and assigns the same for error.

And now the said defendant on this, the twenty-second day of November, 1858, being within thirty days after the

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adjournment of said Court, tenders his bill of exceptions, and says the Court erred.

1st. In all the several orders, decisions, rulings, overrulings, and other matters hereinbefore excepted to.

2d. In charging the jury as hereinbefore set forth, and specifically excepted to; and in the whole charge as given to the jury, and in every part thereof.

3d. In refusing a new trial, and in overruling defendant's motion for the same.

4th. In not suspending the decision of said motion for a new trial, for the purpose of giving the defendant an opportunity to procure Pucket's affidavit, and bring forward evidence in support of the credibility of John W. Evans.

And as the facts aforesaid do not appear of record, the said defendant prays that this, his bill of exceptions, may be signed and certified in terms of the law, &c.

CLARK & LAMAR,
A. W. HAMMOND & SON,
OVERBY & BLECKLEY,
Defendant's Attorneys. .

CLARK and LAMAR; HAMMOND & Son; and OVERBY & BLECKLEY, for plaintiff in error.

T. L. COOPER, Sol. Gen'l, *contra*.

By the Court.—McDONALD J. delivering the opinion.

A new trial was moved for in this case on fourteen grounds. The judgment of the Court refusing the new trial is excepted to, and assigned as error. There are, in the record, several other assignments of error, most of which are made grounds for a new trial, in the motion presented to the Court below, and such as are not and were insisted on before us, we will proceed to consider, after disposing of the points made in

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the motion, and not waived by counsel for the prisoner in this Court.

[1.] The fourteenth ground in the motion was the **first** ground argued before us, in which it is insisted that a new trial should be granted, because the Court instructed the Sheriff, previous to the trial, to direct the different constables of the county to summon tales jurors for said trial, and the said constables did, accordingly, summon a large number of tales jurors, who were put upon the prisoner. This ground, as stated, is not sustained by the record. The Court *advised* the Sheriff to cause the constables to summon a large number of persons residing outside of Atlanta, and in remote parts of the county, to be in attendance at the Court-house, in order that *tales jurors might be summoned with convenience*. None of the persons so summoned, were put upon the defendant as jurors, except such as were taken from the bystanders by the Sheriff, reported to the Court as tales jurors. The case of *Bird vs. The State*, reported in 14 Geo., 51, is a precedent for the course pursued by the presiding Judge in this case, and in fact, goes farther; for the Court, in that case *directed* the Sheriff to cause the persons to be summoned. The reasoning in that case, demonstrates that the practice is convenient to the Court, and beneficial to the person to be tried, by enabling the Sheriff to make up tales jurors from persons less likely to be prejudiced against him. But in this case, there was no objection made to the mode by which the attendance at Court of any of the persons summoned by the Sheriff as tales jurors was procured, and the Court below entertained no doubt that the counsel knew it at the time. This alone is a sufficient reason why a new trial should not be granted on that ground, even if the objection, if made, ought to have been sustained.

[2.] The Court allowed the evidence given by certain of the witnesses, which had been taken down under the eye

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of the Court, according to the provisions of the statute, to be read to them, that any error which might have been committed in writing it down might be corrected.

This Court held in the case of *Crawford vs. The State*, 12 Geo. 145, that the testimony, for such purposes, might be read over at the instance of either party. It is true that the object of taking down the evidence is not that it may be used on the trial, but it is impossible that the prisoner on trial could have been injured by having it twice impressed on the minds of the jury, if it was taken down correctly, and it could do him no injustice to have errors, if any, corrected. The ruling of the presiding Judge on this point is made the ninth ground in the motion for a new trial.

[3.] The first ground on the motion for a new trial, was an alleged error in the Court in permitting the letter of R. J. Crockett to be read in evidence to the jury, and it is the next of these grounds in the order of discussion in this Court. The letter taken alone and separate and apart from the object with which it was read in evidence was inadmissible. No facts or circumstances stated in the letter could be evidence against the prisoner, for they were the unsworn statements of another person, in the absence of the prisoner, and by which he could not be bound, and in regard to which he had no opportunity to interrogate the writer. The Court in his charge to the jury, explained the purpose for which the letter was admitted in evidence, not to prove any fact asserted in it, but for the purpose of ascertaining the purport of the response made to it when read to the prisoner, and for no other purpose. Again, the presiding Judge said to the jury in his charge, that the evidence of a confession ought to be received with great caution, and that the letter purporting to have been written by Crockett was admissible to show the purport of Cobb's reply, and nothing more. It was impressed on the minds of the jury as strongly as it could be, by the Court, that the letter was not received as evidence against the defendant, and that it could not be so

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considered; that they were to look to the letter in connection only, with the reply of the prisoner, and to enable them to understand the import of that reply.

The statements of a wife in the presence of her accused husband may be given in evidence on his trial, although she could not be a witness against him, and her statements could not be evidence. The Court admits it under the general rule, that whatever is said to a prisoner on the subject matter of the charge, to which he makes no answer, or if an answer, no direct answer. That it is the wife who makes the statement does not vary the rule. *Rex vs. Smithies*, 5 Car. & Payne, 332, *King vs. Bartlett*, 7 Id. 832. It is the reply, partial reply, or failure to reply, that is to be looked to as evidence, and the statement, whether verbal or written, which induces it, is to be no further considered than it is necessary to understand the reply. With this object the letter was properly admitted, no matter by whom written.

10 Geo. 519, 520.

[4.] Then, ought the declarations of the defendant made in the penitentiary, as testified to by Eli McConnell, to have been admitted in evidence, or after having been admitted, ought the evidence of them given in by McConnell, as well as the balance of the evidence of that witness, to have been withdrawn from the jury, as moved by defendant's counsel? The testimony of McConnell is confined to the reception of the letter signed "R. J. Crockett," addressed to the prisoner and Jones, the reading of the letter to Cobb, his short interview with him, and his reply. His reply is what is called his confession. The general rule in regard to confessions, and the same rule applies to this case, is, "that a free and voluntary confession by a person accused of an offence, whether made before his apprehension or after, whether on a judicial examination, or after commitment, whether reduced into writing or not, in short, any voluntary confession, made by a prisoner to any person, at any time or place, is strong evidence against him." 1 Phillips Ev. 110

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The place in which the reply to the letter was given, and the person (the keeper of the Penitentiary,) to whom it was delivered, if voluntarily made, under no improper influence, constitute no legal objection to its admissibility. There is no evidence of persuasion, or of influence exerted to obtain a confession, which promised temporal profit or advantage to the prisoner. But there is no necessity for discussing this point, for in fact there was no confession.

[5.] The only remaining question to be considered is, whether the reply, which was a refusal to confess, ought to have been allowed to go in evidence to the jury? A homicide on the body of Samuel B. Landrum had been committed. Radford J. Crockett, (the name signed in full to the postscript to the letter) John Cobb, Jr., and Gabriel Jones, stood charged by indictment with his murder. Radford J. Crockett had pleaded guilty. The letter, on the inner side, was addressed to Cobb and Jones; it contains this expression: "Gabe, I think if you will come out and make a full confession of the murder of Landrum, and look to God for mercy, you would be better satisfied." The principal keeper of the penitentiary was requested to read the letter to them, and inform the writer what they said, or whether they seemed to want to talk about it or not. General McConnell complied with the request, and received for answer from the prisoner that he would not confess. The guilt of the defendant must be established, if established at all, by circumstantial evidence, and every circumstance, pointing however slightly to his guilt or innocence, should be submitted to the jury for their consideration. When he was appealed to by one, presumptively from the name, who was indicted with him for the murder, to confess his guilt of the particular crime with the commission of which he stood charged, he simply declared that he would not confess, and made no denial of his guilt. The answer ought to have gone to the jury, to have been allowed by them, whatever weight they might have considered it entitled to, as indicating, however

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slightly his guilt. They might have inferred that an innocent man would not have contented himself with a simple refusal to confess, but that he would have accompanied it with a positive denial of guilt. It is our judgment, therefore, that when a defendant jointly indicted for murder, with another who has pleaded guilty to the charge, is appealed to by that other, who must know his guilt, if guilty, to confess the crime, and he simply refuses to confess, but does not deny his guilt, the circumstances may be given in evidence to the jury. They would not alone, perhaps, warrant a conviction, but they are certainly entitled to some degree of weight, and should be considered.

[6.] The next and last ground insisted upon in the motion for a new trial, before this Court, is that the Court permitted the Solicitor General, in his concluding argument, to bring before the jury the slung-shot, and to speak of it as a witness, when it had been previously offered in evidence, and ruled out. It is not very clear, from the record, that the "slung-shot" was ruled out as evidence. When it was objected to as evidence, the Court rejected it as not being such an instrument of evidence as had to be *formally tendered and submitted to the jury*, as in the case of a deed or a bond; and when he came to decide the motion to arrest the argument of the Solicitor General, he held, that that officer might exhibit it to the jury, it having been frequently exhibited and identified in their presence before, and that to allude to it as a witness was a matter of taste. We see no good reason for excluding it as evidence; nor do we think that we should control the presiding Judge in a matter of that sort, when he heard the evidence, and was the best Judge if the Solicitor General was in contempt, by disregarding, before the jury, one of his decisions rejecting evidence.

[7.] Thomas Calloway was examined as a witness, to prove that the prisoner had described the slung-shot, and that from his description of it he would know it. He testi-

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fied that he thought he would recognize it from the prisoner's description of it. The slung-shot was shown to him, when the defendant objected to his stating whether or not it was the one the prisoner had described. We can see no legal objection to the witness's answer. He could not, of course, swear to its absolute identity; if he had done so, his evidence might have been the subject of comment before the jury, in the same manner that the testimony of a witness might be asserted who should choose to swear positively to a fact of which he must have been ignorant. But there is no reason why a witness should not give evidence that a particular article which he had heard described, corresponded with the description given.

[8.] The rule laid down by the Court below, in his charge to the jury, on the subject of positive and negative witnesses, is objected to, and error is assigned thereon. The Court said to the jury, that a witness swearing positively to a fact, is to be believed, in preference to many who swear negatively, that they did not see it. The objection is, that the charge applies to the credit of the witnesses personally, rather than to the evidence given by them. This is an exception founded more in a verbal criticism, than in a fault in principle; for if the existence of a fact sworn to positively by one witness, is to be believed, rather than its non-existence, because many witnesses who gave no attention, but were in a situation to observe it, testify that they did not see it, or know that it transpired, which is indisputably the legal principle, what is the difference? Are not the jury bound to regard the testimony given by the witness who swore positively, and disregard that given by the witness who swore negatively?

We perceive no error in the charge of the Court, in laying down the rule for reconciling conflicting evidence.

We have now gone through the entire case, as insisted on in the argument before us. Many of the grounds in the motion for a new trial were not urged in this Court, for the reason that the presiding Judge refused to certify to the facts

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stated in the *rule nisi*, and perhaps for the additional reason that counsel for plaintiff in error concluded that they could not be sustained in law. It was rather conceded, that if the points herein decided, were ruled against the plaintiff in error, the evidence was sufficient to sustain the verdict of the jury. We deem it unnecessary, therefore, to go into an examination of it, and we content ourselves with the remark that we are satisfied with the correctness of the verdict upon the evidence submitted.

Judgment affirmed.

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ADMINISTRATORS AND EXECUTORS,

1. D. applies for administration on H's estate. In opposition, a will is produced, but the will does not convey the entire estate of H., and the Ordinary grants to D. administration on that part of the estate disposed of by the will. B. resisted before the Ordinary the grant to D., and appealed to the Superior Court, where he moved to dismiss the application of D. for the administration. The Court granted the motion.

Held, That, inasmuch as the executor of the will, was not known in the record, or that he had propounded the will, or that he would administer if the will were established, the Court below erred in dismissing the application. *Dean vs. Biggers*,

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2. If the will requires the executor to divide the negroes of the estate, into shares, and give the shares to the legatees, and he gives a negro to a legatee without such a division, and the legatee sells the negro, the fact that the executor omitted the division, is a matter that may affect the executor as between him and the other legatees, unless they have acquiesced for a long time, in the executor's course, but it is not a matter which can affect the person who purchases the negro from the legatee. *Russell vs. Kearney*,

96

3. If there be a joint administration, and only one administrator sue, the non-joinder of the other can only be taken advantage of by plea in abatement, and that being a dilatory plea, the truth of it must be sworn to. If the administrator, not joined, be a *femme*, and she marry during the pendency of the action, it is not necessary to amend the declaration at the trial, by adding her as a party, or to prove that, on her marriage, her letters of administration were revoked, and to pass an order for the suit to proceed in the name of the administrator who alone sued; but if this be done, it does not vitiate the proceedings. *Macon & West. Railroad vs. Davis,*

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4. The administrator of an intestate's estate has a qualified interest in the real estate of his intestate, for the payment of debts and making distribution; and if it is not required for either purpose, his failure to sue a tenant in possession must not be held to prejudice the heirs at law. *Scott vs. Newsom,*

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5. Letters testamentary should be granted in the county of the testator's residence, at the time of his death.

McBain et al. vs. Wimbish,

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6. John Rushin died, leaving a will with three executors, Shad. R. Felton, Jno. C. Rogers, and Wm. Rushin. Felton took possession of the estate, and proceeded to execute the will, but before executing fully, himself died, leaving a will and two executors. Shortly afterwards, Rodgers also died, and Wm. Rushin moved into Alabama. John Rushin left no debts. Some of the legatees under the will of Jno. Rushin, sued the executors of Felton in equity for their legacy.

Held, That the suit lay. Rushin et al. vs. Young et al,

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7. A suit in equity against a person who was an administrator, was a suit to which, he might plead as administrator; a suit in which, the decree might be

against him as administrator; a suit the title set up, in which, was good against him only as administrator; a suit the prayer in which, was against him as administrator.

Held, That it was a suit against him as administrator, and therefore, that he had the right to appeal without giving security. *Irving, guard., vs. Melton, adm'r,* 390

8. Wm. Taylor gave to Philip F. Sapp, a receipt in the following words: "Received of Philip F. Sapp, administrator of Milledge Sapp, deceased, the following promissory notes for collection," (stating them)—"payable to Milledge Sapp, or bearer. The executors of Philip F. Sapp sued the administrator of Taylor, on this receipt. There was evidence sufficient to authorize the jury to conclude, that this contract of collection, was made with Philip F. Sapp in his *individual*, and *not in his official character*. The Court granted a non-suit. *Held*, That the Court ought not to have done so. *Worrill et al. vs. Taylor, adm'r,* 378

9. A Court of Equity will not enjoin an administrator from suing to recover a tract of land, for the benefit of the heirs, notwithstanding the seven years bar has attached, when one of the only two heirs, was before and at the time of the intestate's death, and has been ever since, *non compos mentis*; and the other a *feme covert*, abandoned by her husband, who would not sue, and the wife, by reason of her coverture, could not. *Fleming, adm'r, vs. Collins,* - - - - 494

10. The only source, in general, from which an administrator with the will annexed, can derive the power to sell the slaves held by him, as administrator, is the will, or an order of the Court of Ordinary. *Lawrence, adm'r, vs. Philpot, guard'n* - - - - 585

11. A. dies testate in Henry county. His will is proven and admitted to record in that county. An application is made to revoke the letters testamentary, on account of the birth of a posthumous child unprovided for. In the mean time, that part of Henry county including the testator's residence, at the time of his death, has been cut off into Spalding; and the administrator *de bonis non cum testamento annexo*, has removed to Texas.

Held, That Henry county had jurisdiction of the proceeding; that the right to transfer to Spalding was a personal privilege, and that in this and all similar cases, all done previous to the application in the original county, was rightly done, and valid.—McDONALD J. dissenting. *Knight et al. vs. Knight, adm'r,* - 633

AGENT.

See *Warranty*, 6.

AGREEMENTS.

1. A father made advancements to his sons, when he was not in a sound state of mind. The sons and the daughters agreed, that the advancements should be set aside, and the father's property, including the advanced property, divided out among the sons and daughters, with an advantage to the sons each, of \$1,000.

Held, That there was a sufficient consideration for this agreement. *Fulton & wife vs. Smith et al.* - 413

2. Such an agreement is not against public policy. *Id.*

3. Time, when of the essence of an agreement or contract. *Taylor et al. vs. Baldwin et al.* - 438

AMENDMENTS.

- 1.** A person who was a constable, was sued in trespass, for tortiously taking some negroes. The constable justified under several *si fas*. After the plaintiff had closed his evidence, the constable asked leave to amend his entries on the *si fas.*, by entering on them, a levy on the negroes.

Held, That the Court was right in granting him the leave asked for. *Gorham vs. Hood et al.*

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- 2.** The plaintiff in entering up judgment against the defendant, an endorser of a note, omitted to describe the contract of endorsement, and the defendant made the omission the ground of an affidavit of illegality, on the hearing of which, the Court allowed the judgment to be amended.

Held, That this was right. *Oliver vs. Ross,*

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APPEAL.

An affidavit, made by one who appeals in *forma pauperis*, of his inability to pay cost, &c., is not traversable. *Hines vs. Rosser,*

ARBITRATION AND AWARD.

- 1.** An award of arbitrators at common law, may be attacked and set aside for fraud, and the parties against whom it is rendered, need not resort to a Court of Equity for that purpose. *Hardin vs. Brown,*

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- 2.** Under the Act of 1856, an award can only be impeached for fraud in the arbitrators. But at common law, an award may not only be vacated for corruption or partiality in the arbitrators, but for a mistake into which they have been led by undue means, or into which they have been permitted to fall, by the fraudulent concealment of the party or his agent. *Id.*

3. Courts, while they may not correct the award, or revise the decision of the arbitrators, hold it to be against conscience to take advantage of an award to enforce it, or to use it as a plea to bar a defence. *Id.*
4. An arbitration proceeding under the common law is revocable by either party, at any time before the award. *Davis, ex'or, vs. Maxwell,* - - - - - 368.
5. An exception to an award will not be entertained, unless it is warranted by the facts in the record. *Richardson et al. vs. Hartsfield,* - - - - - 528.
6. The affirmative declaration in the Act of 1856, that the arbitrators may adjourn from day to day, does not, perhaps, necessarily exclude the idea, that they may adjourn for a longer time, should the exigencies of the case require it. *Id.*
7. The failure of the arbitrators to sign the award on the day on which it is agreed to, does not affect its validity. *Id.*

ASSIGNEE.

- A judgment in the hands of, subject to all the defences that it would be in the hands of the original plaintiff. *Rawson vs. McJunkins,* - - - - - 432

ASSUMPSIT.

- An action of assumpsit for money had and received, will not lie, unless the property of the plaintiff has been converted into money, or that which is its equivalent; and the consumption of the property by the defendant is not sufficient to authorize this remedy. *Barlow vs. Stallworth,* - - - - - 517

ATTACHMENTS.

1. A bond for an attachment need not be taken by, or offered for approval by the magistrate who issues the attachment. It is sufficient if taken by any other magistrate. Such bonds, if objectionable, may be amended. *Smith vs. Joiner*, - - - - - 65

2. A judgment, in attachment, will be enjoined, if the defendant had a good defence to the suit, and his failure to make the defence, was owing, not to any fault or negligence on his part, but, to the fault of the plaintiff. *Far. & Ex. Bank vs. Ruse, Patten & Co.* 391

ATTORNEY—POWERS OF.

1. May be recorded under the same rules as the deed made under them, and when thus recorded, may be read in evidence in the same way. *Tenant et al. vs. Blacker*, - - - - - 418

2. Peavy gave to Carter, a power of attorney to convey a lot of land. Carter, in executing the deed, signed his own name, instead of Peavy's name. But there was enough on the face of the deed, to show, that Carter intended the deed as Peavy's, and not as his.

Held, That the deed was a sufficient execution of the power.—BENNING J. *Id.*

BANKS.

- Under the 17th section of the charter of the Southern Bank of Georgia, no action can be brought against said bank under said charter, until special demand is made of the debt or due claimed by the creditor. *Sou. Bank Ga. vs. Mec. Sav. Bank*, - - - - - 252

CERTIORARI.

1. The provision in the Constitution of 1798, conferring power on the Superior Courts to correct errors in inferior judicatories, by writ of *certiorari*, does not require an Act of the Legislature to enforce it. It is explicit enough for that purpose. *Smith vs. Joiner*, - 65
2. If it be alleged that material alterations have been made in the exceptions to the decision of an Inferior Court, and proof be offered to support such allegations, it is error in the Court to refuse to hear it. *Id.*

CHARGE OF THE COURT.

- As to when the evidence is sufficient to warrant.
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CONSTABLES, LEVIES AND SALES BY.

1. One entry of *no personal property*, on a Justice's Court *sic sa.*, is insufficient to justify a constable in levying the *sic sa.* on land. *Carmichael, ex'or, vs. Straun et al.* 341

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CONTEMPTS.

- Questions of contempt are for the Court treated with the contempt; and its decision ought to be final, except, perhaps, in the case in which, the decision shows an enormous abuse of the discretion. *Cabot vs. Yarborough et al.* - - - - - 476

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1. When a witness is rejected for incompetency, the cost for his attendance can only be collected out of the party at whose instance he was subpoenaed. *Crozier vs. Berry*, - - - - - 346

2. Cost in cases of peace warrants, when defendant is discharged, in discretion of Judge. *Keith vs. The State*, - - - - - 483

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COUNSEL—ARGUMENT AND PROFESSIONAL DE- PORTMENT OF.

- The Supreme Court will not control the presiding Judge in the Court below, who heard the evidence and tried the cause, in deciding how far the remarks of counsel are warranted by the evidence before the jury, when it is not clear that they were unwarranted. *Cobb vs. The State*, - - - - - 648

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CRIMINAL LAW.

1. It is not error in the presiding Judge, to refuse to allow an offender to settle a criminal case of the grade, in which he is vested with a discretion to allow the settlement or not. *McDaniel vs. The State*, - - - - - 197
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3. If there be not a full panel, the challenge should be made to the array. *Id.*
4. A juror upon his *voir dire*, and in answer to the question, "Is your mind perfectly impartial between the State and the accused?" Answers, "I think that I am, as I understand it." The Court then asks, "do you understand the question?" The juror replies "yes;" He is an impartial juror, and there is no objection to the mode adopted for testing his indifferency. *Id.*
5. A juror may be disqualified and set aside for cause, on the ground that he is over age, after the statutory questions have been propounded to him, provided the State has not been prejudiced by the irregularity. *Id.*
6. It is not necessary that the juror should be a *citizen* of the county, where the offence is tried for any specified time previously. It is enough, if he be a *resident citizen*, at the time of trial. *Id.*
7. The Court being satisfied from inspection, that a juror is drunk, may set him aside of its own motion. *Id.*
8. It is no objection, that a traverse jury in a criminal cause is present, and hears the Court charge the grand jury upon the penal laws of the State generally; and compliments them upon their vigilance in ferreting out crime and bringing offenders to justice. *Id.*
9. The practice of separating witnesses in a State case, is ancient and salutary; still it is a matter of discretion with the Courts. And it is no abuse of that discretion, to allow one or more of the witnesses to remain in Court, and aid either the State or the accused, in conducting the prosecution or defence; neither does it disqualify a witness from being *re-examined*, that he

has remained in the Court room after he was first examined, or that he has stated to another witness, what he had sworn to; although this last, is a misconduct, which might subject him to the punishment by the Court. *Id.*

10. What the defendant says on the spot, within a minute or a minute and a half, or even three minutes after the transaction, is a part of the *res gestæ*, and admissible as such in evidence. *Id.*
11. When the behavior of a witness is unbecoming, it is the duty, as well as the privilege of the Court, to reprove him for his indecorum. *Id.*
12. When a witness testifies to a fact, as that the deceased was advancing on the accused when he was killed, he may give the reasons of that opinion. *Id.*
13. When the relative position of the several combatants in an affray is material, the State may reintroduce a witness examined in chief to prove that it is different from that testified to by the defendant's witnesses, and exhibit to the jury a diagram, illustrative of his statement, and then the defendant to rebut in the same way. *Id.*
14. When the Court is asked to charge a certain principle to be law, provided the evidence sustains it, it is no error in the Court to give the opposite, or other alternative, provided the proof preponderates on that side. *Id.*
15. An outlaw not entitled to the privilege of a new trial.—LUMPKIN J. *Id.*
16. The Judge of the Superior Court has power, on ex-

amining and considering the evidence returned with a peace warrant, if it be insufficient to require the giving a bond, to discharge the defendant; and he has moreover, the discretion to discharge him without the payment of costs, if, in his opinion, there was no foundation for the proceeding. *Keith vs. The State,* 483

17. It is not error for the presiding Judge to advise the Sheriff to cause the Constables of the county to summon a large number of persons qualified to serve as jurors, living in remote parts of the county, to attend at the Court House on the day appointed for the trial, that tales jurors might be summoned with convenience.

Cobb vs. The State, - - - - - 648

18. It is not error for the Court to allow the testimony of witnesses taken down in writing to be read over to them in the presence of the jury, for the purpose of correcting errors which may have been committed, in writing it down. *Id.*

19. A letter addressed to and read by or to a defendant on his trial, to which he makes a verbal reply, may be read in evidence to enable the jury to understand the reply, but not as evidence of itself. *Id.*

20. That a verbal reply to a written request made in a letter, was made in the Penitentiary to the principal keeper thereof, constitutes no objection in law to its admissibility in evidence against the party making it, if voluntarily made, and drawn out by the exercise of no improper influence. *Id.*

21. When a defendant, who is jointly indicted with another for murder, who has pleaded guilty to the charge, is appealed to by that other, who must know

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his guilt, if guilty, to confess the crime, and he simply refuses to confess, but does not deny his guilt, the circumstances may be given in evidence to the jury. *Id.*

DAMAGES.

1. If the Court charge the jury, in an action of trespass, that if they should believe, under the evidence, that the plaintiffs were entitled to exemplary damages, it was in their discretion to find any amount not exceeding the amount laid in the declaration, it is error, provided the amount laid in the declaration was so great, if found, as to show prejudice or partiality on the part of the jury. Such a charge, in such a case, is calculated to exert an improper influence on the jury, and is wrong in itself. *Bryan vs. Acee et al.* - - - - 87

2. Where a person voluntarily throws himself in the way of a dray, and an injury ensues, the jury may find almost nominal damages, notwithstanding they should be of the opinion that the driver of the dray was slightly more in fault than the party hurt. Notwithstanding the jury may think the person injured altogether in fault; yet, if from pity, or any other consideration, they should return a verdict for damages, and the defendant acquiesce in it, the plaintiff cannot complain, and demand a new trial. *Flanders vs. Meath,* - 358

DEEDS.

1. What a sufficient execution of, under power of attorney. *Tenant et al. vs. Blacker,* - - - 418

2. Consideration of deed, may be shown by parol proof, the same not being inconsistent with the construction of the deed. *Hopkins vs. Watts et al.* - - - 490

DIVORCE.

1. Mental incapacity, at the time of marriage, a ground for divorce in this State *Brown vs. Westbrook,* 102

2. A libel to dissolve the marriage union, on that account, is to be filed and tried, and is subject to all the incidents regulating divorcees, by the statutes of force on that subject. *Id.*

3. A proceeding to declare marriage a nullity, on account of the mental incapacity of one of the parties to consent to the contract, at the time it was entered into, is unknown to our judiciary system, and is repugnant to the feelings and policy of our people. *Id.*

4. The evidence in support of an application for an order of publication, in a divorce case, was, the returns of the Sheriffs of two counties, showing that the defendant was in neither of those counties.

Held, That this evidence was not sufficient. *Godfrey vs. Godfrey,* - - - - - **466**

EJECTMENT.

1. A man who has no title cannot recover in ejectment, although he alleges, that he demises to John Doe, for the use of another man, who does have the title.

Brooking vs. Dearmond, - - - - - **58**

2. Title to land cannot be passed but by writing. *Williams et al. vs. Cowart,* - - - - - **187**

3. One going into possession of land, under a parol purchase, can only hold to the extent of his actual possession. *Cook vs. Long et al.* - - - - - **280**

4. Notwithstanding the tenant may have had possession for seven years, yet if he disclaims having title, and declares he is only waiting to purchase of the true owner, when he can find him, the statute will not protect him against the rightful owner of the fee. *Id.*

5. If a defendant in ejectment enter on land sued for,

under the lessor of the plaintiff, whether by purchase, gift or lease, he cannot dispute the title under which he entered. *Williams vs. Cash,* - - - - - 507

6. If defendant, after entering under the lessor of the plaintiff, sets up a defence against him to a suit for the recovery of the land, hostile to the title under which he entered, he cannot claim to be a tenant at will, and entitled to notice to quit, before suit can be brought. *Id.*

7. If a defendant in ejectment entered into possession of the premises sued for, under a contract of any sort for a title, the statute of limitations could not begin to run in his favor, until he repudiated the contract, and claimed to hold in defiance of plaintiff's title, and the plaintiff had knowledge of such adverse holding. *Id.*

EQUITY.

1. If a Court of Equity has jurisdiction in any case of probate of wills, it is only when such probate is not attainable in a Court of Ordinary. *Slade et al. vs. Street, adm'r,* - - - - - 17

2. If the bill states a title in the plaintiff, and alleges that a discovery is necessary to establish that title, a demurrer, on the ground that there is an adequate remedy at law, is not sustainable. *Turner vs. Jones et al.* 22

3. A mother gratuitously conveyed the half of lot *one hundred and fifty-eight*, to one of her children, she intending to convey the half of lot *one hundred and fifty seven*. She died intestate, leaving this child and other children, and this child filed a bill against her administrator, to correct the mistake.

Held, That he had no right to have the mistake corrected, the deed being voluntary. *Powell et al. vs. Powell,* - - - - - 36

4. When the equity of a bill is fully met and distinctly denied, proceedings at law will not be restrained, unless under special circumstances. *Brett vs. Sellers et al.* 185
5. A Court of Equity has jurisdiction to compel the cancellation of a deed procured without consideration, and by undue influence. *Walker et al. vs. Hunter et al.* 336
6. Where the tax payers of a county resist the collection of a tax, they may unite by bill, asking an injunction, and each will not be driven to his affidavit of illegality. *Vanover et al. vs. Jus. Inf. Court,* - 354
7. Although there be a remedy at law, yet if it be not a complete one, equity has jurisdiction. *Jordan, adm'r, vs. Faircloth, &c.* - - - - 372

EQUITY PLEADING AND PRACTICE.

1. Turner filed his bill against Joiner and Spicer, and against Hodges and others, in which he alleged, that a lot of land, drawn by Jones, was sold under a *fi. fa.* against Jones and bought by Hodges; that the Sheriff make a deed to Hodges, but the deed had been burned with the court-house; that Hodges sold the land to Turner, and that afterwards, Jones, thinking to take advantage of the destruction of the deed, also bought the land, and put Spicer in possession of it, as his tenant. The bill also alleged, that a discovery was necessary, to enable the plaintiff to prove these allegations. It prayed, that the deed might be established, and that the land be delivered to Turner, and the rents accounted for to him.
Held, That Joiner and Spicer were proper parties to the bill. *Turner vs. Jones et al.* - - - - 22
2. A bill had two objects; one, to compel the defendant to convey to the complainant, an interest in the unsold

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lots of a town ; the other, to compel him to pay over to the complainant, a share of the profits made by him, from the sales of the sold lots of the town. The lots lay in one county, and the defendant resided in another. The bill was brought in the latter county.

Held, That the latter county was a proper one in which to bring the bill.

As to when the second bill is the same as the first, so that the judgment or decree in the first, is a bar to the second. *Black vs. Black et al.*

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3. Courts may require amendments to sworn bills, to be themselves sworn to. *Semmes vs. Boykin, adm'r, et al.*

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4. Several creditors of an insolvent corporation may unite in the same bill to charge the stockholders, who were also directors, for fraudulently abstracting the capital stock of the bank ; and the bill is not objectionable to the charge of a misjoinder of both complainants and defendants. *Semmes et al. vs. Mott et al.*

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5. It is premature to move, at the second Term, to dismiss a bill for want of prosecution, before all the defendants are served, and while a demurrer to the bill is still pending at the instance of those who are served. *Id.*

6. A complainant at equity who has sued at law upon the same demand, cannot be compelled to elect in which form he will prosecute his rights, until after the defendant has filed his answer. *Id.*

7. If a cross bill should be necessary, the Court of the county in which the original suit is pending, has jurisdiction of it. *Bowman, ex'or, vs. Long, guard.*

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8. A creditor who files his bill in equity to enforce a legal right, cannot be compelled to make other creditors parties to his bill. *Elmore vs. Spear,*

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9. A recovery by or against the heirs at law, may be pleaded in bar to a suit brought by the administrator of the estate for their benefit, there being no debts due or owing by the intestate. *Hardaway vs. Drummond et al.* 281
10. It is too late, when a case is called for trial on the merits, for the defendant to move to dismiss a bill, because the complainant has an adequate common law remedy, the answers all being in and no demurrer filed. If the answer admits the equity in the bill, or what is alleged as equity, and alleges such matter as, if proven, would defeat the complainant's equity, which matter is not strictly responsive to the bill, this Court will not control the discretion of the Chancellor below, in retaining the injunction. *Hargraves, adm'r, vs. Jones,* 233
11. An objection to a bill on the ground that the complainant has an adequate remedy at law, comes too late at the hearing. It should be taken advantage of the first opportunity by plea or demurrer; otherwise it will be considered as waived. *May et al. vs. Goodwyn,* 352
12. An order to answer exceptions to an answer, did not specify a time within which the answer was to be put in :
Held. That the defendant had until the next Term to file his answer in, and, consequently, that, if he died before that Term, there was no right to take the bill for confessed, although he might have died without answering. *Jordan, adm'r, vs. Fui' cloth, &c.* 372
13. Misjoinder of parties may be obviated by amendment, and is not a ground for dismissing a bill. *Fulton & Wife vs. Smith et al.* 413

See *Adm'rs & Ex'ors*, 6.

EVIDENCE.

1. A tax execution against a tax collector and his surety, must be issued by the Comptroller General ; and when the Sheriff who made a sale under it, delivers it to the Solicitor General, the presumption is that he delivered it at that office, and before secondary evidence of it can be given, an enquiry and search should be made there for it. *Davenport et al. vs. Harris,* - - - 68

2. To prove a diploma given to a physician by a medical college of another State, the legal existence of the college must be shown. *Hunter vs. Blount,* - - 76.

3. If an administrator manage his intestate's estate fairly and honestly, but neglects to make his returns so as to exhibit the state of his accounts in the Ordinary's office, he is not on that account, liable to pay a higher than the ordinary rate of interest chargeable against an administrator ; but if, on demand of a distributee, he fails or refuses to make a full exhibit of his accounts, and come to a settlement, he subjects himself to the costs and expenses of a suit which his default may have made necessary. *Binion et al. vs. Miller, adm'r,* 78

4. If a receipt be given by a guardian to an administrator for negroes expressed to be in full of his ward's distributive share of the estate, and it is insisted that it is expressed to be in full, because all other accounts were balanced and settled, which is nevertheless disputed by the wards, whether the receipt was in full is a question for the consideration of the jury. *Id.*

5. The Acts of Congress, providing for the admissibility of exemplifications in evidence, do not extend to exemplifications of a private writing recorded under our registry laws. *Russell vs. Kearney,* - - - 96

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fore that Term, there was no
confessed, although he might
swearing. *Jordan, adm'r.*

13. Misjoinder of parti-
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"*understanding*," used by a witness, may mean, his knowledge or recollection.

exclude immaterial testimony. *Id.*

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that the deed was admissible in evidence. *Carre'sor, vs. Strawn et al,* - - -

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entries in a merchant's book, made by himself, are admissible in evidence notwithstanding he keeps a *McDaniel vs. Truluck,* - - -

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The note on which, an action was founded, referred to a bond as having been given by the plaintiff, the payee of the note, to the defendant, the maker of the note. The plaintiff read this note in evidence. A bond was then offered in evidence, by the defendant, as the bond referred to by the note—the defendant insisting, that no farther proof of the execution of the bond, was necessary. The note and bond agreed in many particulars, and in none, differed.

6. A party has no right to complain that testimony has been admitted after the evidence has closed, unless he is less prepared to meet it then, than he would have been, had it been admitted at the proper stage of the trial. *Id.*
7. Declarations of a person who is not a party, nor the agent of a party to a transaction, and who is a competent witness, not made *at the time* of the act of which it is insisted it is explanatory, are not admissible in evidence as part of the *res gestæ*. *Macon and Western Railroad vs. Davis*, - - - - - 113
8. A deed exhibited at a Sheriff's sale, said to be a conveyance of the property sold, but which was not read, nor examined by the person who bid off the property, is no evidence for him in an action for refusing to comply with the terms of the sale. *Hendrick vs. Davis, Sheriff*, - - - - - 167
9. If the subscribing witnesses of a lost deed be dead, and the original be not subscribed by a Justice of the Peace or other officer whose attestation is sufficient to admit it to record, nor affidavit be made of its execution, inferior evidence of its contents and execution may be adduced, and if a copy be established by the judgment of Court, evidence of that being made, the established copy ought to be admitted. *Williams et al. vs. Cowart*, - - - - - 187
10. Proof that it is the general plan of a father to *loan*, and not to *give* slaves to his children, when they marry or settle in life, is admissible to rebut the presumption of a gift arising from the possession of slaves by a married daughter. Nor is this testimony controverted by the evidence that he had given land to some of the children. *Lockett vs. Mims*, - - - - - 207

11. "It was my understanding," used by a witness, may and ordinarily does mean, his knowledge or recollection of the facts. *Id.*
12. It is not error to exclude immaterial testimony. *Id.*
13. If the point be made and insisted upon, the statute of another State, can only be proven in our Courts, by a certified copy. *Stanford vs. Pruett*, - 243
14. Evidence which *tends* to establish the issue, is admissible, although not of itself sufficient for that purpose. *Omnibus Co. vs. Semmes*, - - 283
15. The price at which, land was knocked off to a bidder, by the Sheriff, was fifty-two dollars. The deed made by the Sheriff to the bidder, acknowledged the receipt of \$50, and was silent as to the other two dollars. But on the back of the *f. fa.* there were entries showing that the whole \$52, had been properly appropriated by the Sheriff.
Held, That the deed was admissible in evidence. *Car-michael, ex'or, vs. Strawn et al.*, - - 341
16. Entries in a merchant's book, made by himself, are admissible in evidence notwithstanding he keeps a clerk. *McDaniel vs. Truluck*, - - 366
17. The note on which, an action was founded, referred to a bond as having been given by the plaintiff, the payee of the note, to the defendant, the maker of the note. The plaintiff read this note in evidence. A bond was then offered in evidence, by the defendant, as the bond referred to by the note—the defendant insisting, that no farther proof of the execution of the bond, was necessary. The note and bond agreed in many particulars, and in none, differed.

- Held*, That the bond was admissible without farther proof. *Rhame vs. Bower*, - - - - - 408
18. It is competent to prove a fact which tends to establish a matter not directly in issue, but which when proven, may be entitled to some weight, on the trial of the main issue between the parties. *Causey, ex'or, vs. Wiley, Banks & Co. et al.* - - - - - 444
19. Facts which came to the knowledge of a witness, by reason of his being connected with the case as attorney at law, cannot, under the statute, be given in evidence by him. *Id.*
20. A man's conduct may be such, as to authorize the presumption, that he admits to be well founded, a plea set up against his claim. *Block & Bro's vs. Hicks & Co.* - - - - - 522
21. The declaration of one party, uttered in the presence of the other, and not denied by that other, are admissible as evidence for the former. *Ib.*
22. It is sufficient to prove the substance of the testimony of a deceased witness. *Trammel, adm'r, vs. Hemp-hill et al.* - - - - - 525
23. When the matter in issue is, whether or not the defendant was served, the jury are authorized to infer that he was not, from the fact that no attempt was made to enforce the judgment, for some fifteen or twenty years after it was rendered; and the defendant continuing all that time in the adverse possession of the premises. *Blackwell et al. vs. Bird*, - - - - - 545
24. Evidence tending to prove that a judgment rendered against an infant, which judgment was offered

- and received in evidence, was null and void for the want of service, and for the want of a proper representative, and for other reasons, is admissible. *Johnson et ux. vs. Wright et al.* - - - - - 555
25. The terms of a proposition to compromise made to a party, and his reply thereto, are admissible in evidence against him.—McDONALD J. dissenting. *Lucas vs. Parsons et al.* - - - - - 593
26. Witness may answer whether an instrument which he has heard described, but has never before seen, answers the description given, or is the same instrument, and if he make an improbable statement, it may be made the subject of comment before the jury. *Cobb vs. The State,* - - - - - 648
27. No error in the charge of the Court to the jury that one positive witness is to be believed, rather than many negative witnesses to the same point. It does not differ from the legal principle, that the existence of a fact testified to by one positive witness is rather to be believed, than that such fact did not exist, because many witnesses who had the same opportunity of observation swear that they did not see or know of its having transpired. *Id.*

FACTORS.

If the factor pays the draft of the planter, upon the faith of produce which he never receives, he is entitled to recover the amount in an action for so much cash paid for his use; and on the balance due on the account between the cash received and the cash advanced for the defendant, the plaintiff is entitled to interest. *Howard vs. Behn & Foster,* - - - - - 174

FRAUD.

1. If there be legal capacity, and no imposition of fraud, a contract of suretyship is binding; but weakness of capacity on the part of the surety, and the fact that it is a contract of suretyship, may be considered on the issue of fraud in procuring it. *Causey vs. Wiley, Banks & Co. et al.*, - - - - - **444**
2. A charge to the jury, that "fraud is not to be presumed, but must be proved by those alleging it," unexplained, is not a legal charge in a case in which there is evidence of facts and circumstances tending to prove fraud. *Id.*

FRAUDS—STATUTE OF.

1. The purchase of land, payment of the consideration taking possession and making valuable improvements, sufficient to relieve a parol agreement from the operation of the statute of frauds. *Scott vs. Newsom*, - **125**
2. The statute of frauds will apply to a verbal contract for the sale of land, unless there is part performance, or some matter, to prevent it from so applying. *Lumpkin vs. Johnson*, - - - - - **485**

FRAUDULENT ASSIGNMENTS.

A mortgage deed is not within the Act of 1818, to prevent persons unable to pay their debts, from assigning their property, "*in trust*," for some of their creditors, in preference to others. *Solomons vs. Sparks et al.*, **385**

FREE PERSONS OF COLOR.

The guardian of may ratify his contract, and a suit upon such contract by the guardian is sufficient evi-

dence of such ratification. *Hargrove vs. Webb & Allen.* - - - - - 173

GRANTS.

1. A copy grant ought not to be received as evidence, without an excuse for the non-production of the original. *Brooking vs. Dearmond,* - - - - - 58

2. A grant was issued in the name of Boswell Cook, and a certificate of the Surveyor-General was offered in evidence, to show that the grant, by mistake, had been issued in the name of Boswell Cook, when it should have been issued in the name of Roswell Cook.

Held, That under the Act of 1857, for the admission of parol evidence to show mistakes in grants, the certificate was admissible. *Id.*

3. It is entirely competent for the Legislature to prescribe the mode by which the public domain shall be disposed of by the State ; and if the law directs only a certificate to issue to the purchaser, as the evidence of his title, it is equally sacred as a grant. *Harris vs. Dyer, ex'or,* - - - - - 211

4. A grant to land, the sale of which was not only not authorized by law, but suspended from the operation of the act under which it was sold, is void ; and it is competent to make proof of this fact. *Id.*

5. The drawer has before grant a vendible interest in the land drawn. *Tenant et al. vs. Blacker,* - - - - - 418

GRANTS, FRAUDULENT.

If parties to writs of *scire facias* to avoid grants for lands alleged to have been fraudulently drawn, were

not entitled in strict law, to appeal from verdicts rendered against them, we will not upset the authoritative adjudications and practice of the Courts which decided upon the rights. It would unsettle titles to land to too great an extent to hold to the contrary of these adjudications now. *Johnson & wife vs. Wright et al.*, 555

See *Evidence*, 22.

GUARDIAN AND WARD.

1. A guardian is responsible for only such property of his ward as is accessible to him. *Bethune, Ord'y, vs. Green*, - 56
2. To bind infants by a settlement made by the administrator with their guardian, it must be a full and final settlement without fraud, or if fraudulent, the fraud must have been known to the infants, and they must have acquiesced for the period of the statutory bar. *Binion, et al. vs. Miller, adm'r*, - 78

HUSBAND AND WIFE.

1. When a man marries a wife entitled to an estate from her former husband, which he receives and promises to hold in common with that coming to her daughter, of whom he is guardian, and at the maturity of his ward, settle the same upon his wife, said contract is valid ; and the fact of his holding possession of the undivided property under such circumstances, will not be a reduction of it to possession, by him *as husband* : further, the wife is entitled to the same by survivorship, at the death of her husband ; and a Court of Equity will decree a settlement thereof for her benefit, even *as against* the creditors of the husband, and her claim constitutes a sufficient consideration to support an agreement be-

tween her and her son-in-law, as to the division of said property. *Robson vs. Jones*, - - - - 266

2. When it is sought to charge the husband, as trustee, and the proof shows he never accepted the trust, it is not competent for the plaintiff to strike out the name of the husband, and substitute that of the wife as *cestui que trust*. *Lennard vs. Jones, trustee*, - - 309

3. Negroes were conveyed to a trustee, his heirs, executors, and administrators, forever, in trust; first, for husband and wife, for their joint lives; secondly, for the survivor, for his or her life; thirdly, for the children; with a power to the husband, at his death, to distribute the property among the children, and to end the trust, and in case of his failure to do this, with a direction to the children to divide it among themselves; and, with a final declaration, that the trust should cease, when the youngest child arrived at lawful age, provided the husband should be then dead. The husband was not then dead. He died afterwards; and after his death, the wife died. Before her death the trustee commenced an action of trover for some of the negroes. It did not appear that she had a legal representative.

Held, That the trustee was entitled to recover, at least what was her interest in the negroes. *Garrett, trustee, vs. Brock*, - - - - - 576

INJUNCTIONS.

1. While any material allegation, constituting the equity of the bill, remains unanswered, the injunction will not be dissolved. *Wooten, adm'r, vs. Smith et al.* 217
2. New matter introduced in the answer, and not responsive to any charge in the bill, should not be considered, on a motion to dissolve an injunction. *Id.*

3. An administrator will not be enjoined from suing at law for land, for the benefit of the heirs, although the seven years bar has attached, when one of the two only heirs, was before, and at the time of the intestate's death, and at the time of bringing suit, *non compos*, and the other a *feme covert*. *Fleming, adm'r, vs. Collins*, - - - - - 494
4. A railroad company filed their bill in which, they stated, that they had the right of way, over a certain piece of land, and that a certain person was about to erect a flouring mill within seven or eight feet of their track; and, that the mill, if so erected, would leave no sufficient room, for the repair and construction of the track. They prayéd for an injunction to prevent the erection of the mill.
Held, That they were entitled to the injunction. *Cunningham vs. Rome Rail Road Co.*, - - - - - 499
5. An administrator and one C. referred a dispute between them as to some negroes, to arbitrators, who awarded the negroes to the administrator, and a sum of money to C., to be paid out of the negroes. The negroes were worth ten times the sum of money. The administrator proceeded to take steps to sell the negroes; the next of kin prayed an injunction to prevent the sale.
Held, That the injunction was properly granted. *Lawrence, adm'r, vs. Philpot, guard.* - - - - - 585

INSOLVENT DEBTORS.

1. When one of the sureties on a *ca. sa.* bond, surrenders the principal, the act is a discharge of all the sureties. *Compton vs. Williams*, - - - - - 29

2. Lassiter and Cross were sureties for Williams, on a *ca. sa.* bond. Lassiter surrendered Williams, and thereupon, Brown wrote on the back of the bond, "I hereby agree to be bound on said bond in his," Lassiter's "stead."

Held, That this writing meant, that he, Brown, was to be liable only along with Cross as Lassiter had been; not, that he was to be liable, whether Cross was or not.
Id.

3. The principal in a *ca. sa.* bond, is not discharged from it, by the discharge of the sureties, nor, by the act of the Sheriff, in letting him go at large. Therefore, if he appears according to the condition of the bond, he is to be dealt with, as though nothing unusual had happened. *Id.*

4. M. was arrested upon *ca. sa.*, and gives bond for his appearance at a certain Court, to take the benefit of the Insolvent Debtors Act. At the Term specified, the case is reached in its order on the docket and called, but there is no appearance. Judgment was entered up on the bond. Subsequently, and after the jury was discharged, the attorney of the security surrenders up the principal in open Court, and upon his motion, the judgment is set aside, the security exonerated, and the case continued until the next Court.

Held, That it was error to re-open the proceedings, vacate the judgment, and discharge the security. *McKay et al. vs. Ragan*,

203

5. Notice is given by an insolvent debtor to his creditors, that he will apply at the next Term of the Superior Court for an order, appointing a time to hear his application for a discharge. At the Court, he moves to take the oath, the creditor by his counsel being present, making no complaint that he is surprised by the form

of the notice, and on that account asking for time to show cause against the motion.

Held, That the law has been substantially complied with. And further, that our insolvent laws are to be liberally construed in favor of liberty. *Taylor & Co. vs. Hughes*,

224

6. H. was arrested under a *ca. sa.*, at the instance of B. He gave bond to take the benefit of the insolvent debtors Act. He was again arrested at the instance of W., and gave bond to keep the prison limits. The securities in the *ca. sa.* bond surrendered H. to the Sheriff, and he gave another prison limits bond. Upon the expiration of the six calendar months, under the first prison limits bond to W., the Sheriff put H. in jail, the other prison limits bond having still six days to run. H. escaped from jail.

Held, That the securities on the second bond were not liable. *Horton et al. vs. Hicks, Sheriff*,

311

7. The Act of 1823, is not wholly repealed by the Act of December 11th, 1858. *Elrod vs. Gilliland, Howell & Co.*

467

8. A *ca. sa.* having issued from a Justices Court, and the defendant arrested thereon, he gave a bond returnable to the next Term of the Inferior Court, to take the benefit of the insolvent debtors Act. At that Term, he was surrendered by his bail, who tendered a receipt for the original note, upon which the judgment was rendered, and moved that the principal be discharged. The judgment had been sold as the property of the estate of the payee by his administrator, and bought by a third person.

Held, That the Inferior Court had no jurisdiction to try the title to the judgment. *Culberson, adm'r, vs. Gray*,

520

JUDGMENTS.

1. A judgment in one suit, is not a bar to another suit, if the parties in the two suits are not the same; or, if, although the parties in the two suits are the same, they sue, or are sued, in one suit, in a right different from the right in which they sue, or are sued, in the other. *Brooking vs. Dearmond*, - - - - - 58
2. A judgment does not determine a question which, it appears of record, could not have been adjudicated. *Jordan, adm'r, vs. Faircloth*, - - - - - 372
3. Judgments in cases of attachments, when opened and new trial granted. *Far. & Ex. Bank vs. Ruse, Pat-tent & Co.* - - - - - 391
4. Judgment in the hands of an assignee subject to all the equities between the original parties. *Rawson vs. McJunkins*, - - - - - 432
5. The Superior Court may direct an order, passed in 1834, to appoint a guardian *ad litem* for an infant, and which was not put on the minutes at the time, to be entered thereon now for then. *Johnson et ux. vs. Wright et al.* - - - - - 555
6. The Court ought not to withdraw from the jury a judgment, because an entry of service on the writ on which the judgment was obtained, is not regular. *Id.*

JUDGMENTS OF U. S. COURTS.

An execution issued from the Circuit Court of the United States, can claim money in the hands of the officers of the State Courts. *McNair vs. Bateman et al.* 181

LIENS, STATUTORY.

The lien of a machinist for machinery furnished for a

mill, &c., must be enforced according to the provisions of the Act of 1834, as extended by the Act of 1854, and not those of 1841, as extended by the Act of 1852. *Turyear vs. Nisbet*, - - - - - 515

LIMITATIONS, STATUTE OF.

1. Although time may be running against an equitable title, yet, if that title comes to an infant, time will cease to run during the infancy; equity in this respect follows the Statute of 1817. *Ex'ors of Everett vs. Adm'r's of Whitfield*, - - - - - 133
2. Seven years possession of the land purchased from the defendant in a *fi. sa.*, must follow the purchase, in order to exempt the land from levy and sale under the *fi. sa.* Registration of the deed made to the purchaser, will not do in place of this possession. *Carmichael, ex'or, vs. Strawn et al.* - - - - - 341
3. Although a suit at law terminates in a verdict for the defendant, and not in a nonsuit, a discontinuance, or a dismissal, yet, if the case was such, that a nonsuit was all that the defendant was entitled to, by reason of a decision of the Court, excluding from the jury, the consideration of the plaintiff's title; and, the suit be renewed within six months in equity, the second suit will be held in equity, as within the Act of 1847, and saved from the statute of limitations. *Jord.in, adm'r, vs. Faircloth, &c.* - - - - - 378

See *Ejectment*, 4, 7.

LOST PAPERS.

Who are proper parties to a proceeding to establish copies of lost papers. *Bogle & Fields vs. Maddox*, 472

See *Pleadings*, 7.

MARSHALING SECURITIES AND ASSETS.

In equity, all creditors are equally meritorious. If there are several funds, and some creditors have liens on one fund, and some on another, and there is one creditor having a general lien on all the funds, equity will not permit this creditor to take his whole claim out of one of the funds, but will compel him to take *pro rata* out of all the funds. *Semmes vs. Boykin, adm'r, et al.*

47

See *Partnerships, &c.* 1.

MORTGAGES.

1. A mortgagee need not make proclamation of his mortgage, in order to protect his lien, provided the mortgage has been duly recorded. Nor does it make any difference in this respect, whether he be casually present at the sale of the mortgaged premises, under a common law execution of a junior lien, or not, provided he does nothing to countenance the sale. His silence will not prejudice his lien. *Patterson vs. Esterling et al.*

205

2. In a proceeding to foreclose a mortgage on real estate, it is competent for the mortgagor, at the second Term, to show for cause, why the rule absolute should not be granted, that the mortgage debt is usurious, that it is founded upon a gaming consideration, or that it was contracted to compound a felony, or that the mortgage was given under duress, or has been released, or to avail himself of any other defence which goes to show that the mortgagee is not "*entitled*" to a judgment of foreclosure, or that the amount claimed is not *due*. *Dixon, adm'r, vs. Cuyler, adm'r,*

248

3. The administrator of the mortgagee is entitled to foreclose *at law* against the administrator of the mortgagor,

- and the heirs of the mortgagor are not necessary parties. *Id.*
4. A mortgage lien on land may be released in whole or in part, by parol, upon the payment to the mortgagee of the price of the property. *Howard vs. Gresham,* • 347
5. Ordinarily, a judgment of foreclosure bars only the rights of the mortgagor, his heirs and legal representatives. *Id.*
6. Payment may be pleaded to a suit at the instance of the assignee, upon a note transferred after due and secured by mortgage. *Id.*
7. Mortgage, not an assignment in trust, within the Act of 1818, to prevent fraudulent assignments. *Solomon vs. Sparks et al.* - - - - - 385
- NEW TRIALS.
1. A judgment granting a new trial, on the ground that the verdict was contrary to the evidence, will not be disturbed, except in a case of flagrant abuse of discretion. *Jacobs vs. Pou, adm'r,* - - - - - 33
2. Whether the verdict of the jury was contrary to evidence, without evidence, and against the weight of evidence, considered and determined. *Macon and Western Railroad vs. Davis,* - - - - - 113
3. When there is positive evidence in support of a verdict, though there is evidence on the other side strongly conflicting with it, this Court will not reverse the judgment of the Judge presiding in the Court below refusing a new trial. *Scott vs. Newsom,* - - - - - 125
4. The discretion of the Circuit Judge in refusing to grant a new trial, will not necessarily be overruled in

this Court, notwithstanding we may think the verdict contrary to the weight of evidence, *Lockett vs. Mims.* 207

5. Where a case has been fully and fairly submitted to the jury, both upon the law and the facts, and the Circuit Judge is not dissatisfied with the verdict, it requires an extraordinary case to authorize this Court to interfere and award a new trial. *Morris et ux. vs. Stokes, adm'r,* - - - - - 239

6. In cases of vagrancy where the evidence is sufficient to authorize the grand jury to present the accused, and the traverse jury to convict him of the offence, and the presiding Judge refuses a new trial, this Court will not interfere. *Waddel vs. The State,* - - - - - 262

7. A decree for so much money will not be set aside, unless the Court is satisfied that it is excessive, and to an amount that will justify a renewal of the litigation. *Robson vs. Jones,* - - - - - 266

8. A Court will hardly award a new trial in an important case, because testimony has been inadvertently admitted, which is wholly immaterial, and which it is apparent could have helped or hurt neither party. *Id.*

9. One ground of a motion for a new trial, was, newly discovered evidence, viz: a judgment which would operate as an estoppel, on the other party. The evidence received, contained nothing about any judgment at all.

Held, That the newly discovered evidence was evidence that was "not merely cumulative in its character." *Lane vs. Holliday et al.* - - - - - 339

10. Verdict must be strongly against the evidence to authorize this Court to reverse the Court below refusing a new trial. *Phillips vs. Stewart,* - - - - - 402

11. Where there is evidence to support the verdict, judgment of the Court below refusing a new trial, will not be disturbed. *Orr, adm'r, vs. Huff*, - - - 422
- See also *Rawson vs. McJunkins*, - - - 432
12. A new trial will be granted when the verdict of the jury is so uncertain that it cannot be executed, or is expressed in such terms that an objectionable part cannot be set aside with justice to both parties. *Mitchell vs. Printup*, - - - - - 469
13. Where the verdict is strongly and decidedly against the evidence, the judgment of the Court below, refusing a new trial, will be reversed.—McDONALD J. dissenting. *Lucas vs. Parsons et al.* - - - - - 593

See *Damages*, 2.

NOTICE TO SUE.

When a note to which there is a surety, is held by a creditor as collateral security, such creditor is the proper person to be notified by the surety to sue the principal, under the act of 1831. *McCrary vs. King et al.* 26

PARTNERSHIPS.

1. On the death of a member of two partnerships, both of which are insolvent, and the estate of the deceased member is insolvent also, the creditors of each partnership must look to the effects of the partnership of which he is a creditor, for payment, and the separate creditors must look to the assets of the deceased partner for payment; in case of a surplus it is to be applied to the debts of the other class of creditors. *Thornton et al. vs. Bussey et al. adm'rs*, - - - 302

2. Money belonging to one mercantile firm cannot be appropriated to the payment of cost executions against another firm. *Lyon, Sheriff, vs. Wilcher,* - 496

PAYMENTS, APPLICATION OF.

- A payment by the debtor to the creditor is, when there are more debts than one, to be applied to that debt to which, the debtor directs it to be applied, if he makes any direction. *Semmes vs. Boykin, adm'r, et al.* - 47

PLEADING.

1. A dilatory plea must be filed at the appearance term. *Hargrove vs. Webb & Allen,* - - - - 173
2. Under the Judiciary Act of 1799, every defendant is entitled to state his defence plainly, fully and distinctly, according to the truth of the case, without being required to spread a falsehood upon the record under the pain of being entrapped by technical rules. *Bryan vs. Gurr,* - - - - - 378
3. In an action of slander, the plea of justification puts the plaintiff's general character in issue. *Id.*
4. When the plea of justification has been filed, and is not demurred to for insufficiency, and evidence has been admitted under it without objection, it is error in the Court, *sua sponte*, in its charge to the jury, to instruct them, that the plea is defective, and the defendant can take nothing by it. *Id.*
5. As to when suit may be brought by the representative of a deceased executor or administrator, or by an administrator *de bonis non* of first testator or intestate. See *Worrill et al executors vs. Taylor, adm'r,* - 398

6. The marriage of a *feme sole* defendant, pending the action, is no ground for an abatement. *Phillips vs. Stewart*, - - - - - 402
7. Bogle & Fields had an attachment on the land of Hunter. To this land a claim was interposed by Woods and others, who derived their title, from Maddox, who derived his title from the same Hunter. Maddox sued Hunter, by petition, for the establishment of the deed made to him, by Hunter—alleging that it was lost. Bogle & Fields moved to be made parties defendant to this suit. The Court overruled this motion.
Held, That the Court did right. *Bogle & Fields vs. Maddox*, - - - - - 472
8. A suit pending against a party, on his death, cannot be continued against an executor *de son tort*. *Irving vs. Sterling et al.* - - - - - 563

See *Husband and Wife*, 2.

PRACTICE IN SUPERIOR COURT.

1. It is not error for the Court to allow irrelevant testimony to be withdrawn from the jury. *Davenport et al. vs. Harris*, - - - - - 68.
2. Plaintiff may introduce the sayings of a person through whom the defendant claims title in an action of ejectment, to prove the loss or destruction of a deed, to lay the foundation for introducing secondary evidence of its contents; but if such secondary evidence be admitted, notwithstanding the rejection of such evidence, it is no ground to reverse the judgment of the Court upon. *Id.*

3. If testimony be admitted by the Court to enable the party introducing it, to make it applicable to the case by the introduction of other proof, after the introduction of such other proof, the objecting party must move to withdraw it, and if he does not, it must be held that he acquiesces in its remaining before the jury. *Scott vs. Newsom*, - - - - - 125
4. Professional propriety in the argument of causes. *Lockett vs. Mims*, - - - - - 207
5. The second original of a declaration against two persons, was served only thirteen days before Court. *Held*, That the suit became a nullity, under the 8th section of the Judiciary Act of 1799. *Reese et al. vs. Shepherd, ex'or*, - - - - - 226
6. Where a bank is sued, an appearance by the bank to take advantage of an important privilege secured by the charter, is a waiver of any irregularity in the service of the writ. *Sou. Bank Geo. vs. Mec. Savings Bank*, - - - - - 252
7. Where an action is brought against the maker and endorser of a promissory note residing in different counties, and the writ has been regularly filed, sued out and served on the non-resident defendant, leave may be granted to perfect service on the resident defendant. And after both defendants have appeared and filed a meritorious defence, and the case is on the appeal, it is too late to object to any irregularity in the proceeding, even if any such existed. *Lamar vs. Cottle et al.* - - - - - 264
8. The defendant asked leave to re-introduce a witness, his counsel stating, that he could prove a material fact

by the witness—a thing that he did not know of, when the witness was first examined. The plaintiff's counsel "objected to the witness being recalled." The Court sustained the objection.

Held, That the Court erred. *Bone vs. Ingram*, - 382

9. A witness of the plaintiff's, swore, that a third person had made a material statement to him. Afterwards, both parties closed their evidence, and the Court adjourned until next morning. Before the argument commenced the next morning, the defendant's counsel asked leave to examine this third person, himself—stating, that, such person would contradict the witness; that he was out of the county, the evening before, when the evidence was closed; and, that the defendant was ready to swear, that he did not anticipate, that the witness would testify to any such matter.

Held, That the Court ought to have granted the leave asked for. *Id.*

10. Every application for a continuance, should be heard by the Court, and determined according to its circumstances. *Roberts et al. vs. Moore*, - 411

11. An attorney may, in some cases, make a showing to continue a cause, notwithstanding the client lives in the county. *Id.*

12. A material witness, who is absent *in Texas*, at the time of trial, will not be presumed to have absented himself fraudulently to enable the party subpoenaing him, to delay the case. *Id.*

13. The security to be exacted of a party who asks that another may be required to produce his deed, or

other writing, to be annexed to interrogatories, ought at least to be as much as a bond of indemnity, and a consent that if the deed, or writing be not restored, objections to it shall be waived, and a copy of it on file be read in its place, not only in that case, but in all subsequent cases. *Stevens vs. Zachary,* - - - - - 427

14. The reinstatement of a dismissed case will not be disturbed, when it appears that the plaintiff was not culpably negligent, and that the defence suffered nothing by the reinstatement. *Davis & Gazzaway vs. Alexander,* - - - - - 479

PRACTICE, IN SUPREME COURT.

1. If the error assigned be, that the Court refused to admit in evidence representations and statements made by the Sheriff, at his sale of property, the record must show what those representations and statements were, or this Court cannot pass upon them. *Hendrick vs. Davis, Sheriff,* - - - - - 167

2. When a case is brought up to this Court a second time, with no new facts to change substantially the view of it taken before, it only remains for this Court to re-affirm its first judgment, by affirming generally the judgment of the Court in attempting to enforce it. *Sunderlin vs. Sanderlin,* . - - - - - 334

PRINCIPAL AND SURETY.

See *Promissory notes,* 5.

PROMISSORY NOTES AND BILLS OF EXCHANGE.

1. A promissory note dated in December, was expressed to be payable on the "25th day of December next." Pa-

rol evidence was offered to show, that the 25th day of December, intended, was the 25th day of the same December, in which the note was made.

Held, That the parol evidence ought to have been received. *McCrary vs. Caskey*, - - - - 54

2. A. and B. are indebted to C. at Columbus, Georgia, who agree to take their note with D. as security, who resides in Alabama. A note is drawn dated at Columbus, carried by the *makers*, to D., who endorses it, and returns it to one of the makers, who delivers it to C. at Columbus.

Held, That the endorsement is a Georgia and not an Alabama contract. *Stanford vs. Pruett*, - - - 243

3. Where a bill of exchange or draft is endorsed *in full*, by the payees, suit cannot be maintained in the name of the payees, while the endorsement stands. *Southern B'k. of Ga. vs. Mechanics Saving B'k*, - 252

4. Where two sets of notarial protests upon the same bill, are filed under the Act of 1836, both are entitled to be read without further proof by the Notary. *Id.*

5. About the time a note fell due, the holder went to the maker, and after conversing with him about the note, entered into an agreement with him, by which, in consideration of a promise, of 8 pér cent. of usury, he was to wait with him twelve months on the note. The maker was then able to pay the note, and would have paid it, if pressed for its payment. Afterwards, he dealt in cotton, and broke. The endorser knew nothing of this agreement.

Held, That he was discharged. *Stallings vs. Johnson*, 564

PURCHASER WITHOUT NOTICE.

When a purchaser of land with notice of a prior unrecorded deed, sells to one without notice, the old deed being still unrecorded, the title of the latter will be protected. *Lee et al. vs. Cato et al.* - - - 637

RAILROADS—THEIR LIABILITIES AND ACTIONS AGAINST, &c.

1. In suits against a railroad company, if it appear that there were mutual faults, the party guilty of the greater wrong or negligence, must be regarded as an original aggressor. *Macon and Western Railroad vs. Davis*, 113
2. When a railroad company has used a piece of ground as a wood-yard, for a long time, all persons building contiguous thereto, are chargeable with a knowledge of the fact, and of the right of the company to pile up wood upon any part of the premises, when it suits their interest or convenience to do so. *Macon and Western Railroad vs. McConnell*, - - - 481
3. If a railroad company hires or charters cars to any one, absolutely, the hirer cannot look to the company for damages in case of injury to his property as a common carrier. His remedy for injuries must be on contract of hire, and the implied undertaking of the company, that the hired cars are substantial and will be duly carried to their point of destination, &c. &c. *E. Tenn. and Ga. Railroad vs. Whittle*, - - - 535

See *Injunctions*, 4.

REFORMING CONTRACTS.

When a party seeks to reform a contract, he should state distinctly what the true agreement was, which was intended to be expressed in the writing; and if the bill alleges contradictory statements, the defendant is entitled to abide by that most favorable to him. *Marshall, adm'r, vs. Drawhorn,* - - - - - 275

REGISTRY LAWS—PRIORITY UNDER.

1. A. sold a tract of land to B., in April, 1834; the deed was recorded in 1840. A. sold the same land to C. in July, 1834; this second deed was recorded in 1836.
Held, That the first conveyance would hold, neither having been recorded within time. *Martin vs. Williams*, - - - - - 406

2. Where a purchaser of land, *with notice* of a prior unrecorded deed, sells to one, *without notice*, the old deed being still unrecorded, the title of the latter will be protected.—BENNING J. dissenting. *Lee et al. vs. Cato et al.* - - - - - 637

REMAINDERMEN AND TENANTS FOR LIFE.

1. An estate given to A. for life or years, with remainder to B. does not make A. the trustee of B. as to B's remainder. *Russell vs. Kearney*, - - - - - 96

2. If the guardian of a legatee, whose legacy is limited over in remainder, if he should die before he attains the age of twenty-one years, sues for the recovery of the legacy, the defendant may amend his answer before the hearing, and allege the embarrassed circumstances, and perhaps, insolvency of the guardian, and

ask the Court that he may be required to enter into bond for the security of the remaindermen. *Bowman, ex'or, vs. Long, guard'n,* - - - - - 179

RULE AGAINST SHERIFF.

1. Money in Court, on a rule for its distribution, must be applied, as far as it goes, to the oldest lien attached thereon, provided there be nothing to affect the validity of the lien. *Thomson vs. McCordel,* - - 273
2. Money in the hands of the Sheriff, belonging to one mercantile firm cannot be appropriated to the payment of cost executions against another firm. *Lyon, Sheriff, vs. Wilcher,* - - - - - 496

SHERIFFS, LIABILITY OF.

1. If a Sheriff collect money, and of his own accord deposits the money in a Bank which fails, he is liable to respond to the plaintiff. *Phillips, ex'r, vs. Lamar, Sheriff,* - - - - - 228
2. The Court has no authority to make the Sheriff special bail in trover, founded on the Act of 1821. *Outlaw vs. Gilmer,* - - - - - 365

SHERIFFS' SALES, LEVY, &c.

1. That part of the statute pointing out the duty of the Sheriff, in making sale of property executed by him, and declaring that he shall advertise the sale in three of the most public places in the county, is directory to the Sheriff only, and if he omit to do it, such omission does not vitiate the sale; but any person injured by this neglect of duty, has a remedy against him. *Hendricks vs. Davis, Sheriff,* - - - - - 167

2. To hold a person who refused to comply with the terms of Sheriff's sale, liable for the difference between the price at which he bid off the property, and the price at which it was subsequently sold, the same property must have been resold, and resold as the property of the identical parties as whose property it had been bid off by him. *Id.*

3. Levied this *fi. fa.* on "the undivided interest of Mary Moore and Henry E. Moore, in the following negroes," &c., "the interest being such as is conveyed to them by deed on record in the Bibb Superior Clerk's office, by George W. Moore, 19th August, 1843, and recorded 8th September, 1843."

Held, That the levy in this case was sufficiently definite and certain. *Solomon vs. Breazeal et al.*

200

SLANDER.

See *Pleadings*, 2, 3, 4.

STATUTES.

An Act of the Legislature repealing laws and *parts* of laws militating against that Act, repeals an Act having conflicting provisions, so far only as the two Acts are repugnant to each other. *Elrod vs. Gilliland, Howell & Co.*

467

TAXES.

By the twelfth section of the Act of 1856, the Inferior Court of Terrell county were authorized to collect an extra tax for *county purposes*, of such per cent on the State tax, as to the said Court might deem necessary and proper. From the sale of town lots the court-house had been paid for, and likewise the jail, lacking \$1,300, and there were some \$4,000 of assets still in hand. Three Justices of the Court met in chambers, and after

imposing 50 per cent on the State tax for *county purposes*, and ten per cent for bridges, they assessed 200 per cent on the State tax for "Public Buildings."

Held, That this latter tax was without authority of law and void.

The provision in the 21st section of the Tax Act of 1804, prohibiting judicial interference with the levy and collection of taxes imposed by that Act, does not extend to county and corporation taxes, nor to taxes which are not authorized by that Act, and the general tax Acts amendatory thereof. *Vanover et al. vs. Jus. Inf. Court,*

354

TIME.

When of the essence of a contract. *Taylor et al. vs.*

Baldwin et al.

438

TRESPASS.

A constable not being *authorized* to levy on negroes, when there is a sufficiency of other personal property to be found ; if he does, in that case, levy on negroes, *trespass* will lie against him. *Gorham vs. Hood et al.*

299

TROVER.

1. In trover, by one having a partial interest in the chattel converted, he can recover only an equivalent for his interest. *Russell vs. Kearney,*

96

2. Trover, when the proper remedy, and not assumpsit. *Barlow vs. Stallworth,*

517

TRUSTS.

When executed. *Garrett, trustee, vs. Brock,*

576

See *Husband and Wife*, 3.

TRUSTEES.

A trustee purchasing property in his own name, and paying for it with his own effects, holds it as his own, and it is subject to the payment of his debts, unless before a judgment lien attaches it is transferred, *bona fide*, to his *cestui que trust*. *Stanley vs. Gilmer et al.* 589

VENDOR'S LIEN.

When, in founding a city, certain lots are reserved, and dedicated by the founder to particular public purposes, and the donees fail or refuse to accept the same, these lots revert to the grantor; and the vendor's lien for the unpaid purchase money attaches upon said lots, or rather has never been detached, inasmuch as the title to the same has never passed out of the donor. *Still, ex'or, vs. Mayor and Council of the City of Griffin,* 502

VOLUNTARY CONVEYANCES.

The doctrine, that a voluntary conveyance must yield to a subsequent one, founded on valuable consideration, applies only where both conveyances are made by the same person. *Russell vs. Kearney,* - - - 96

WARRANTY.

1. Patent defects, to which the attention of the buyer is called, and against which he disclaims all purpose of holding the seller responsible, are not covered by a warranty of soundness. *Marshall, adm'r, vs. Drawhorn,* 275
2. That a vendee, (of a slave,) with warranty, sells without warranty, does not authorize the conclusion, that he *waives* his warranty. *Dukes vs. Nelson, ex'or,* 457

3. Although a person who holds a warranty of soundness of a slave, sells the slave without himself making a warranty of his soundness, yet, it does not follow, of necessity, that he sustains no loss by the slave's unsoundness. That will depend on how much he gets for the slave, as compared with what he gave for the slave. *Id.*
4. A warranty of soundness, is not negotiable. *Id.*
5. A breach of the warranty, is matter defensive, in a suit for the price. *Id.*
6. If an agent buy a slave in his own name, giving his own note in payment, and taking a warranty to himself, he may, when sued on the note, set up a breach of the warranty in his defence. *Id.*

WILLS.

1. S. H. executed his will and died. By the third item he bequeathed to J. F. H., his only child, certain property; and by the 6th item, he directs as follows: "In case my son S. dies before he arrives at twenty-one years of age, and without issue, all the property given hereinbefore to my said son, I give and devise to my blood relations, of nearest kin, to be equally divided among them." J. F. H. died under twenty-one years of age, and without issue. At the time of the execution of the will, and death of the testator, M. H., a widow, was the only surviving brother or sister of the testator. She had children. There were two families of nephews and nieces, the children of deceased sisters. The parents of the testator were dead. All of the foregoing facts, it was agreed, were well known to the testator at the time he made his will. After the death of testator, and while his son was still in life, the only surviving sister died.

Held, That the children of M. H. were not entitled to the whole of the contingent legacy, but that the families of the two other sisters were entitled to participate.

Clifton et al. vs. Holton, adm'r, - - - 321

2. Jurisdiction of Ordinary as to revoking probate of, on account of birth of posthumous child, the place of testator's late residence having been cut off into another county since probate. *Knight et al. vs. Knight, adm'r*, 633

At. E.S.C.

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